This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

11 KF94
1281
NEDL TRANSFER
HN 2XZP 6

Digitized by Google

KF1281

ES OF

BOST N LIBRARY.

FRANKLIN PLACE.

Not more than THREE volumes shall be taken out at the same time, and no books shall be permitted to be taken or used, but by the owner of a share, or his family.

For the first year after the admission of a Book, a fine of ten cents is incurred for each library day it may be kept beyond the time limited on the cover; and, after the first year, of five cents per library day, if detained beyond five weeks;—for abuse of Books, the value thereof when new. If any Book be lost, the same must be replaced by a similar volume, or by paying the current price of a new volume: if it be part of a set, the rem der must be taken, paying the current price new set.

THREE DOLLARS assessmen t be paid previous to the delivery of any ok, after the annual meeting.

All Books must be returned to the for inspection on the Saturday previou annual meeting, which is always on the se d Friday of June: the fine for non-compliance is one dollar.

Books must be called for by their numbers, and not by their titles.

The Library is opened every Tuesday, Thursday, and Saturday afternoons, from 3 to 6 in summer, and 3 to 5 in winter;—also every Saturday forenoon, from 10 to 1 o'clock.

No person shall be allowed to go within the railing, or to take down any Book, without the special leave of the Librarian.

The present price of a share is 25 dollars.

HARVARD COLLEGE LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

TRIAL

14 9

OF

SAMUEL CHASE,

AN ASSOCIATE JUSTICE

OF THE

SUPREME COURT OF THE UNITED STATES,

IMPEACHED

BY THE

HOUSE OF REPRESENTATIVES,

FOR

HIGH CRIMES AND MISDEMEANORS,

BEFORE THE

SENATE OF THE UNITED STATES.

TAKEN IN SHORT-HAND

BY SAMUEL H. SMITH AND THOMAS LLOYD.

VOLUME II.

WASHINGTON CITY:

PRINTED FOR SAMUEL H. SMITH.

1805.

Digitized by Google

KF 1281

Digitized by Google

TRIAL OF SAMUEL CHASE.

THURSDAY, FEBRUARY 21, 1805.

Mr. CLARK.

Mr. PRESIDENT,

I RISE only to make a few remarks on two of the articles, the fifth and sixth, that the counsel for the respondent may be possessed of all the points we mean to make. I will endeavor in a few words to state the practice which we think ought to have been pursued in the case of Callendar. The practice in the federal courts is regulated by that in each state. If this position be correct, we contend, that the proper process in the case of Callendar was a summons. An act of Virginia, passed in the year 1792, provides that the grand jury "shall present all treasons, murders, felonies, *or other misdemeanors whatsoever*, which shall have been committed or done within the district for which they are impannelled."

By another act of Virginia, passed in the same year, it is enacted that "upon presentment made by the grand jury of an offence not capital, the court shall order the clerk to issue a summons or other proper process against the person or persons so presented, to appear and answer such presentment *at the next court*, and thereupon hear and determine the same according to law."

In this last provision the words "*or other proper process*" have a direct application to the previous provision; which enacts that the grand jury

Digitized by Google

shall present all treasons, murders, felonies " or other misdemeanors." For treasons, murders and felonies, we admit that a capias is the proper process; and when the law directs *other proper process*, it had reference to a class of crimes where a capias was required. It is in vain alleged, that the counsel for Callendar made no objection to the process issued. They were not at that time to be considered as his counsel; it was only after he was brought into court that their duty commenced.

Further, whether the proper process was a capias or summons, the law of Virginia requires that it shall be returnable to the next court; and I contend that this point is established by the English practice. To shew which I refer to Hawkins Pleas of the crown, where it is stated that a *venire facias*, which is in the nature of a summons, is the proper process, and that it is returnable to the next court.

It was surely then the duty of the judge to be acquainted with the laws of England, however unacquainted he may have been with the laws of Virginia. He cannot, therefore, on this ground, attempt a justification from ignorance. In his answer he informs us that ignorance of the law is no excuse. If it is no excuse in an unlettered individual, shall it constitute the apology of him who was expressly appointed to expound the law and administer justice? And if on this occasion he was not acquainted with the law, did it therefore become him to proceed with such fatal precipitancy? No sooner was the presentment made, than the marshal, before any indictment was brought in, was dispatched after Callendar. We can only account for this, by supposing that it was the intention of the judge to act in conformity to his previous declaration, however jocularly it may have seemed to have been made; and that this was one

Digitized by Google

of the means he had determined to pursue in order to convict Callendar, regardless of the dignity of his station or the innocence of the man. Having offered these few remarks, I am instructed to say that the case is fully opened on the part of the prosecution.

Mr. HOPKINSON.

Mr. President,

WE cannot remind you, and this honourable court, as our opponents have so frequently done, that we address you in behalf of the majesty of the people—We appear for an an ancient and infirm man, whose better days have been worn out in the service of that country which now degrades him; and who has nothing to promise you for an honourable acquittal but the approbation of your own consciences. We are happy, however, to concur with the honorable managers in one point—I mean the importance they are disposed to give to this cause. In every relation and respect in which it can be viewed, it is indeed of infinite importance. It is important to the respondent to the full amount of his good name and reputation, and of that little portion of that happiness, the small residue of his life may afford. It is important to you, Senators and Judges, inasmuch as you value the judgment which posterity shall pass upon the proceedings of this day. It is important to our country, as she estimates her character for sound, dignified and impartial justice in the eyes of a judging world. The little, busy vortex that plays immediately round the scene of action, considers this proceeding merely as the trial of Judge Chase, and gazes upon him as the only person interested in the result. This is a false and imper-

Digitized by Google

fect view of the case. It is not the trial of Judge Chase alone. It is a trial between him and his country: and that country is as dearly interested as the Judge can be, in a fair and impartial investigation of the case, and in a just and honest decision of it. There is yet another dread tribunal to which we should not be inattentive. We should look to it with solemn impressions of respect. It is posterity—the race of men that will come after us. When all the false glare and false importance of the times shall pass away—when things shall settle down into a state of placid tranquility and lose that bustling motion that deceives with false appearances—when you, most honourable Senators, who sit here to judge, as well as the respondent who sits here to be judged, shall alike rest in the silence of the tomb, then comes the faithful, the scrutinizing historian, who without fear or favour will record this transaction; then comes a just and impartial posterity, who, without regard to persons or to dignities, will decide upon your decision. Then, I trust, the high honour and integrity of this court will stand recorded in the pure language of deserved praise, and this day will be remembered in the annals of our land, as honourable to the respondent, to his judges, and to the justice of our country.

We have heard, sir, from the honourable managers who have addressed you, many harsh expressions. I hope, sir, they will do no harm. We have been told of the respondent's unholy sins, which even the heavenly expectation of sincere repentance cannot wash away; we have been told of his volumes of guilt, every page of which calls loudly for punishment. This sort of language but pursues the same spirit of asperity and reproach which was begun in the replication to our answer. But we come here, sir, not to complain of any

Digitized by Google

thing; we come expecting to bear and to forbear much. It does indeed seem to me, that the replication filed by the honourable managers on behalf of the House of Representatives and of all the people, carries with it more acrimony than either the occasion or their dignity demanded. It may be said they have resorted for it to English precedent, and framed it from the replication filed in the celebrated case of Warren Hastings. There is, however, no similarity between that case and ours. Precedents might have been found more mild in their character and more adapted to the circumstances of our case. The impeachment of Hastings was not instituted on a petty catalogue of frivolous occurrences, more calculated to excite ridicule than apprehension, but for the alleged murder of princes and plunder of empires. If, however, the choice of this case as a precedent for our pleadings has exposed us to some unpleasant expressions, it also furnishes to us abundance of consolation and hope. There, the most splendid talents that ever adorned the British nation were strained to their utmost exertion to crush the devoted victim of malignant persecution. But in vain—The stern integrity—the enlightened perception—the immoveable justice of his judges stood as a barrier between him and destruction, and safely protected him from the fury of the storm.—So, I trust in God, it will be with us.

In England, the impeachment of a judge is a rare occurrence. I recollect but two in half a century. But in our country, boasting of its superior purity and virtue, and declaiming ever against the vice, venality and corruption of the old world, seven Judges have been prosecuted criminally in about two years. A melancholy proof either of extreme and unequalled corruption in our Judiciary, or of strange and persecuting times among us.

Digitized by Google

The first proper object of our inquiries in this case is, to ascertain with proper precision what acts or offences of a public officer are the objects of impeachment. This question meets us at the very threshold of the case. If it shall appear that the charges exhibited in these articles of impeachment are not, even if true, the constitutional subjects of impeachment, if it shall turn out on the investigation that the Judge has really fallen into error, mistake or indiscretion, yet if he stands acquitted in proof of any such acts as by the law of the land are impeachable offences, he stands intitled to discharge on his trial. This proceeding by impeachment is a mode of trial created and defined by the constitution of our country; and by this the court is exclusively bound. To the constitution then we must exclusively look to discover what is or is not impeachable. We shall there find the whole proceeding distinctly marked out; and every thing designated and properly distributed necessary in the construction of a court of criminal jurisdiction. We shall find, 1. Who shall originate or present an impeachment. 2. Who shall try it. 3. For what offences it may be used. 4. What is the punishment on conviction. The first of these points is provided for in the 2d sec. of the 1st art. of the constitution, where it is declared that "the House of Representatives shall have the sole power of impeachment." This power corresponds with that of a grand jury to find a presentment or indictment. In the third section of the same article, the court is provided before whom the impeachment thus originated shall be tried—"the Senate shall have the sole power to try all impeachments." And the fourth section of the second article points out and describes the offences intended to be impeachable, and the punishment which is to follow conviction; subject to a limitation in the third section of the first article.

Digitized by Google

Have any facts then been given in evidence against the respondent which make him liable to be proceeded against by this high process of impeachment? What are the offences? What is the constitutional description of those official acts, for which a public officer may be arraigned before this high court? In the fourth section of the second article of the constitution it is declared that "the President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Treason or bribery is not alledged against us on this occasion. Our offences then must come under the general description of "high crimes and misdemeanors," or we are not impeachable by the constitution of the United States. I offer it as a position I shall rely upon in my argument, that no judge can be impeached and removed from office for any act or offence for which he could not be indicted. It must be by law an indictable offence. One of the gentlemen indeed who conduct this prosecution, (Mr. Campbell) contends for the reverse of this proposition, and holds that for such official acts as are the subject of impeachment, no indictment will lie or can be maintained. For, says he, it would involve us in this monstrous oppression and absurdity, that a man might be twice punished for the same offence, once by impeachment and then by indictment. And so most surely he may; and the limitation of the punishment on impeachment takes away the injustice and oppression the gentleman dreads. A slight attention to the subject will shew the fallacy of this gentleman's doctrine. If the absurdity and oppression he fears will really ensue on indicting a man for the same offence for which he has already been impeached, they must be charged to the constitution

Digitized by Google

itself, which in the 3d sec. of the 1st art. after limiting the extent of the judgment in cases of impeachment, goes on to declare that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law." The idea of the honourable manager is, that for acts done in the course of official duty, a judge must be proceeded against exclusively by impeachment; and that no indictment will lie in such case. The incorrectness of this notion appears not only from a reference to the constitution, but to the known law of England also. I will remind you of a case, stated, I believe, in the elementary books of the law, in which it is said that if a judge undertakes of his own authority to change the mode of punishment prescribed by law for any crime, he is indictable; for instance, should he sentence a man to be beheaded, when the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, sir, I contend, that in order to sustain an impeachment, an offence must be proved upon the respondent which would support an indictment, I do not mean to be understood as admitting that the converse of the proposition is true; that is, that every act or offence is impeachable which is indictable. Far from it. A man may be indictable for many violations of positive law, which evince no *mala mens*, no corrupt heart or intention—but which would not be the ground of an impeachment. I will instance the case of an assault, which is an indictable offence, but will not surely be pretended to be an impeachable offence, for which a judge may be removed from office. It is true that the 2d sec. of the 1st art. which gives the House of Representatives the sole power of impeachment, does not in terms limit the exercise of that power. But its obvious meaning is, not in that place, to

Digitized by Google

describe the kind of acts which are to be subjects of impeachment, but merely to declare in what branch of the government it shall commence. The House of Representatives has the power of impeachment; but for what they are to impeach, in what cases they may exercise this delegated power, depends on other parts of the constitution, and not on their opinion, whim or caprice. The whole system of impeachment must be taken together and not in disjointed parts; and if we find one part of the constitution declaring who shall commence an impeachment, we find other parts of it declaring who shall try it, and what acts and what persons are constitutional subjects of this mode of trial. The power of impeachment is with the House of Representatives—but only for impeachable offences. They are to proceed against the offence in this way when it is committed, but not to *create* the offence, and make any act criminal and impeachable at their will and pleasure. What is an offence is a question to be decided by the constitution and the law, not by the opinion of a single branch of the legislature; and when the offence thus described by the constitution or the law has been committed, then and not until then, has the House of Representatives power to impeach the offender. So a grand jury possesses the sole power to indict: but in the exercise of this power they are bound by positive law, and do not assume under this general power to make any thing indictable which they might disapprove. If it were so, we should indeed have a strange, unsettled and dangerous penal code. No man could walk in safety, but would be at the mercy of the caprice of every grand jury that might be summoned; and that would be crime to morrow which is innocent to day.

What part of the constitution then declares any of the acts charged and proved upon Judge Chase,

Digitized by Google

even in the worst aspect, to be impeachable? He has not been guilty of bribery or corruption; he is not charged with them. Has he then been guilty of "*other high crimes and misdemeanors?*" In an instrument so sacred as the constitution, I presume every word must have its full and fair meaning. It is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for *high* crimes and misdemeanors. Although this qualifying adjective "*high*" immediately precedes and is directly attached to the word "*crimes*," yet from the evident intention of the constitution and upon a just grammatical construction, it must be also applied to "*misdemeanors.*" The repetition of this adjective would have injured the harmony of the sentence without adding any thing to its perspicuity. How would this be in common parlance? Suppose it should be said that at this trial there are attending many ladies and gentlemen. Would it be doubted that the adjective *many* applies to gentlemen as well as ladies, altho' not repeated. Or if there is any thing peculiar in this respect in this word "*high*," I will suppose it were said that among the auditors there are men of high rank and station. Would it not be as well understood as if it were said that men of high rank and high station are here? There is surely no difference. So in the constitution it is said, that "a regular statement of the receipts and expenditures of all public money shall be published from time to time." Is not the account to be regular as well as the statement? I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the constitution be not admitted, and the adjective "high" be given exclusively to "crimes" and denied to "misdemean-

Digitized by Google

ors," this strange absurdity must ensue. That when an officer of the government is impeached for a crime, he cannot be convicted unless it proves to be a high crime: but he may nevertheleless be convicted of a misdemeanor of the most petty grade. Observe, sir, the crimes with which these "other high crimes" are classed in the constitution, and we may learn something of their character. They stand in connection with "*bribery and corruption;*" tried in the same manner and subject to the same penalties. But if we are to lose the force and meaning of the word "*high*" in relation to misdemeanors, and this description of offences must be governed by the mere meaning of the term "misdemeanors," without deriving any grade from the adjective, still my position remains unimpaired, that the offence, whatever it is, which is the ground of impeachment, must be such an one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument we must give to words their legal significations—A misdemeanor or a crime, for in their just and proper acceptation they are synonimous terms, is an act committed or omitted, in violation of a *public* law, either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and, by it, let him stand justified or condemned.

Does not, sir, the court, provided by the constitution for the trial of an impeachment, give us some idea of the grade of offences intended for its jurisdiction? Look around you, sir, upon this awful tribunal of justice—is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created—does such a court sit to scan and punish paltry errors and indiscretions too insignificant to

Digitized by Google

have a name in the penal code, too paltry for the notice of a court of Quarter sessions? This is indeed employing an elephant to remove an atom, too minute for the grasp of an insect. Is the Senate of the United States solemnly convened and held together in the presence of the nation to fix a standard of politeness in a judge, and mark the precincts of judicial decorum? The honourable gentleman who opened the prosecution (Mr. Randolph) has contended for a contrary doctrine, and held that many things are impeachable that are not indictable. To illustrate his position, he stated the cases of habitual drunkenness and profane swearing on the bench, which he held to be objects of impeachment and not of indictment. I do not desire to impose my opinions on this court as of any value. But surely I could not hesitate to say that both of the cases put by the gentleman would be indictable. Is there not known to us a class of offences, not provided for indeed by the letter of any statute, but which come under the general protection which the law gives to virtue, decency and morals in society—Any act which is *contra bonos mores* is indictable as such. And it is so, not by act of Congress, but by the pure and wholesome mandates of that common law, which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position that nothing is impeachable that is not also indictable, for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offence either of omission or commission against some statute of the United States—or some statute of a particular state, or against the provision of

Digitized by Google

the common law. Against which of these has the respondent offended? What law of any of the descriptions I have mentioned has he violated? By what is he to be judged, by what is he to be justified or condemned, if not by some known law of the country; and if no such law is brought upon his case—if no such violation rises on this day of trial in judgment against him, why stands he here at this bar as a criminal? Whom has he offended? The House of Representatives—and is he impeached for this? I maintain as a most important and indispensable principle, that no man should be criminally accused, no man can be criminally condemned but for the violation of some known law by which he was bound to govern himself. Nothing is so necessary to justice and to safety as that the criminal code should be certain and known. Let the judge, as well as the citizen, precisely know the path he is to walk in, and what he may or may not do. Let not the sword tremble over his unconscious head, or the ground be spread with quicksands and destruction, which appear fair and harmless to the eye of the traveller. Can it be pretended there is one rule of justice for a judge and another for a private citizen; and that while the latter is protected from surprize, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws before made known to him, the latter is to be exposed to punishment without knowing his offence, and the criminality or innocence of his conduct is to depend not upon the laws existing at the time, but upon the opinions of a body of men to be collected four or five years after the transaction? A judge may thus be impeached and removed from office for an act strictly legal, when done, if any House of Representatives for any indefinite time after, shall for any rea-

Digitized by Google

son they may act upon, choose to consider such act improper and impeachable. The constitution, sir, never intended to lay the judiciary thus prostrate at the feet of the House of Representatives, the slaves of their will, the victims of their caprice. The judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing. Suppose a grand jury should make a presentment against a man—stating that most truly he had violated no law or committed any known offence; but he had violated their notions of common sense, for this was the standard of impeachment the gentleman who opened gave us, he had shocked their nerves or wounded their sensibility. Would such a presentment be received or listened to for a moment? No, sir—And on the same principle, no judge should be put in jeopardy because the common sense of one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of punishment or praise, would thus shift about from day to day. Are we to depend upon the House of Representatives for the innocence or criminality of our conduct? Can they create offences at their will and pleasure—and declare that to be a crime in 1804 which was an indiscretion or pardonable error, or perhaps an approved proceeding in 1800? If this gigantic House of Representatives, by the usual vote and the usual forms of legislation, were to direct that any act heretofore not forbidden by law, should hereafter become penal, this declaration of their will would be a mere nullity—would have no force and effect, unless duly sanctioned by the Senate and the approbation of the President. Will they then be allowed, in the exercise of their power of impeachment, to create crimes and inflict the most serious penalties on actions never before suspected to be criminal, when they could not

Digitized by Google

have swelled the same act into an offence in the form of a law. If this be truly the case, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty prostrated at the foot of this omnipotent House of Representatives—and may God preserve us—The President may approve and sign a law, or may make an appointment which to him may seem prudent and beneficial, and it may be the general, nay the universal sentiment that it is so—and it is undeniable that no law is violated by the act. But some four or five years hence there comes a House of Representatives whose common sense is constructed on a new model, and who either are or affect to be greatly shocked at the atrocity of this act. The President is impeached—In vain he pleads the purity of his intention, the legality of his conduct, in vain he avers that he has violated no law and been guilty of no crime. He will be told, as judge Chase now is, that the common sense of the House is the standard of guilt, and their opinion of the error of the act conclusive evidence of corruption. We have read, sir, in our younger days, and read with horror, of the Roman emperor who placed his edicts so high in the air that the keenest eye could not decypher them, and yet severely punished any breach of them. But the power claimed by the House of Representatives to make any thing criminal at their pleasure, at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. Shall I be called to heavy judgment now for an act which when done, was forbidden by no law and received no reproach, because in a course of years there is found a set of men whose common sense condemns th[illegible]—The gentlemen have referred us to this s[illegible], and being under the necessity to acknow-

Digitized by Google

ledge that the respondent has violated no law of the community, they would on this vague and dangerous ground accuse, try and condemn him. The code of the Roman tyrant was fixed on the height of a column, where it might be understood with some extraordinary pains; but here to be safe, we must be able to look into years to come, and to foresee what will be the changing opinions of men or points of decorum for years to come. The rule of our conduct, by which we are to be judged and condemned, lies buried in the bosom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright administration of justice, sir, is of the utmost importance to any people—the other movements of government are not of such universal concern—Who shall be President or what treaties or general statutes shall be made, occupies the attention of a few busy politicians—but these things touch not, or but seldom, the private interests and happiness of the great mass of the community—But the settlement of private controversies—the administration of law between man and man—the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness—Hence I consider the judiciary of our country most important among the branches of government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favour or fear from any quarter, the situation of a people can never be very uncomfortable or unsafe—But if a judge is forever to be exposed to prosecutions and impeachments for his official conduct on the mere suggestions of caprice, and to be condemned by the mere [redacted] of prejudice, under the specious name of [redacted]

Digitized by Google

sense, can he hold that firm and steady hand his high functions require—No—if his nerves are of iron they must tremble in so perilous a situation. In England the complete independence of the judiciary has been considered and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has however been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that in our republican institution the same reasons for it do not exist—that it is indeed inconsistent with the nature of our government that any part or branch of it should be independent of the people from whom the power is derived. And as the House of Representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controuling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges were more essentially important in a monarchy or a republic, I should certainly say, in the latter. All governments require, in order to give them firmness, stability and character, some permanent principle, some settled establishment—The want of this is the great deficiency in republican institutions. Nothing can be relied upon—no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion—If however the judiciary is stable and independent—if the rule of justice between men rests upon known and permanent principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world and in its own internal

Digitized by Google

concerns. This independence is further requisite as a security from oppression. All history demonstrates from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics both ancient and modern—With this difference; that in the latter the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government. The people destroy not deliberately and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue, but while the fit is on, their devastation and cruelty is more terrible and unbounded than the most monstrous tyrant. It is for their own benefit and to protect them from the violence of their own passions that it is essential to have some firm, unshaken, independent branch of government, able and willing to resist their phrenzy—If we have read of the death of a Seneca under the ferocity of a Nero; we have read too of the murder of a Socrates under the delusion of a republic—An independent and firm judiciary protected and protecting by the laws would have snatched the one from the fury of a despot and preserved the other from the madness of a people.

I have considered these observations on the necessary independence of the judiciary applicable and important to the case before this honorable Court, to repel the wild idea that a judge may be impeached and removed from office although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong—propriety and impropriety of demeanour. For if this is to be the tenure on which a Judge holds his office and character; if by such a standard his judicial conduct is to be adjudged criminal or inno-

Digitized by Google

cent, there is an end to the independence of our judiciary. In opposition to this reasoning I have heard (not from the honorable managers) a sort of jargon about the sovereignty of the people, and that nothing in a republic should be independent of them—No phrase in our language is more abused or more misunderstood. The just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment that all power originally emanates in some way from them, and that all responsibility is finally in some way due to them. And whether this is acknowleded or not, they have, if driven to the last resort, a physical force, to make it so—But sir, this sovereignty does not consist in a right to controul or interfere with the regular and legal operations and functions of the different branches of the government at the will and pleasure of the people. Having delegated their power, having distributed it for various purposes into various channels, and directed its course by certain limits, they have no right to impede it while it flows in its intended directions—Otherwise we have no government—In like manner the officers of government are responsible in certain modes and at certain periods for the exercise of their duties and powers—but the people have no right to make them accountable in any other manner or at any other period than that prescribed by the great compact of government—or constitution. Having parted with their power under certain regulations and restrictions, they are done with it—they are bound by their own act, and having retained and declared the manner in which they will correct abuses in office, they have no right to claim any other sort of responsibility—If this be not the case, what government have we ? What rule of conduct ? What system of association ? None—But are truly in a

Digitized by Google

state of savage anarchy and ruthless confusion; with all the vices incident to civilization without the restraints to controul them.

Having discussed this necessary preliminary point as to what is or is not impeachable, I will proceed to a consideration of the charges now in issue between the respondent and the House of Representatives of the United States. It will be some relief to this honorable Court to learn that for the expediting of this trial, and to avoid useless and irksome repetition, the counsel for the respondent have divided the articles of impeachment among themselves. I shall beg leave to address you on the first article, which relates to the transactions at Philadelphia, on the trial of John Fries for high treason.

The gentleman (Mr. Early) who has offered you his observations on these articles of impeachment, appears to have grounded his argúment, not on the evidence but on the articles. Supposing, perhaps, that they would be proved, he has taken it for granted that they have been proved, and has shaped his remarks accordingly. Had we filed a general demurrer to these charges, thereby admitting them as stated, the argument of the gentleman might have had the force and application he intended.—But if I mistake not, the respondent has pleaded not guilty, and the case must therefore be decided by the amount of the evidence, and not by the averments of the articles. I admit, indeed, that the honorable managers are put to some difficulty in this respect. They are under the necessity of making their election betweeen the articles and the evidence as the foundation of their argument; for they are so totally dissimilar that they could not take them both: they meet in so few and such immaterial points, that no man can argue from them both for five sentences—This being

Digitized by Google

the situation of the gentlemen, he has thought proper to select the articles and the facts therein set forth as the foundation of his argument in defiance of the testimony. In the observations I shall have the honor to submit, I propose to take the evidence as my text and guide, and leave the articles, to shift for themselves, under the care and patronage of our honorable opponents.

Upon reading this first article of impeachment against the respondent, after a due degree of horror and indignation at the monstrous tyranny and oppression pourtrayed in it, the first question that would strike the mind of the inquirer would naturally be, when did this horrid transaction take place—when and where was it that Judge Chase thus persecuted an unfortunate wretch to the very brink of the grave, from which he was snatched by the interference of executive mercy, shocked at the injustice of his condemnation? When were the rights of juries and the privileges of counsel and their clients thus thrown down and prostrated at the feet of a cruel and inexorable judge? What would this inquirer think and believe on being informed that these atrocious outrages upon justice, law and humanity were perpetrated five years since—Why and where has the justice of the country slumbered so long? What now awakens it from this lethargic sleep? Why has this monstrous offender so long escaped the punishment of his crimes? To what region of refuge did he fly? But will not surprize be greatly increased, when it is told that at the time of the trial of John Fries, this injured and oppressed man, at the very time when these crimes of the judge were committed, the Congress of the United States, the guardian of our lives and liberties, were actually in session in the very city where the deeds were done, and probably witnessed the whole transaction—I do not expect to be answered

Digitized by Google

here, for I cannot suspect our honourable opponents of so much illiberality, that at that period the administration of our affairs was in the hands of the political friends of the judge, and therefore he was permitted to escape however atrocious his crimes. Whatever, sir, may have been the character of that administration, even if a weak and wicked one, as it has been represented, it could have no object in protecting any individual at so great a risque to themselves and their reputation. If judge Chase had really violated the law and constitution to come at the blood of Fries, and had done this in the face of the public, the administration would have put too much at hazard by endeavouring to shelter him. I hope, however, no such reason will be given for the neglect of these charges—And as we most cheerfully and truly confide in the justice of the present administration, we trust no such distrust will be avowed of the integrity of the former—we feel as safe under trial now as we should have done then, and look without distrust for the same impartial justice from this honorable court, as we should have expected and received at any time.

We feel however, sir, a serious inconvenience from the delay of this prosecution. In five years facts fall into oblivion, and witnesses engaged in their ordinary occupations of life cannot tax their memories with the circumstances of such distant events. It is difficult to discover indeed who were present at the transaction—To guard against injustice of this kind, even in civil cases, and protect us from fraudulent and slumbering demands, a limitation is put by law upon the claims of every man. The criminal code of the United States has justly adopted the same principle—By a statute, no person shall be prosecuted or punished for treason or other capital offence, with some exceptions, unless the indictment be found within three years af-

Digitized by Google

ter the offence is committed; and for smaller offences the prosecution must be instituted within two years. We cannot it is true claim the benefit of the letter of this law, but we may claim something from its principle; in expecting from this honourable court every indulgence and allowance for any deficiency in our proof, which should be attributed not to the real weakness of our case, but to the unreasonable staleness of the charges. Judge Chase was a stranger in Philadelphia, and necessarily found extreme difficulty in discovering what persons were in court at the time to which the charges relate, and in selecting those who had the best recollection of the transaction.

This first article, sir, charges, "That unmindful of the solemn duties of his office, and contrary to the sacred obligations by which he stood bound to discharge them faithfully and impartially and without regard to persons, the said Samuel Chase on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May 1800, whereat the said Samuel Chase presided, did in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust." This general accusation is followed by three distinct specifications of offence, to wit:

"1. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence:

"2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative

Digitized by Google

of the positions, upon which they intended to rest the defence of their client:

"3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give."

In the whole of these specifications I am able to discover but one truth; the rest is wholly contradicted and disproved by the evidence—It is true, that judge Chase did form and reduce to writing, and, in a limited manner, deliver an opinion on a question of law, on the construction of which the defence of the accused materially depended—but when the article goes on to charge that this opinion tended to prejudice the minds of the jury against the case of John Fries the prisoner, before counsel had been heard in his defence, it is utterly unfounded and untrue—To whom was this opinion delivered? To the counsel for Fries and to the attorney for the United States; and to no other person. The third copy, and but three were made, never was delivered to the jury or to any other person, and never could produce any prejudice or injury to John Fries—Nor indeed was it ever intended to come to the knowledge of the jury, until they had completely heard the discussion of the case by counsel, when they were to have *taken out* with them this opinion of the judge upon the law of the case submitted to them. At that period of the trial when it was not only the right but the duty of the court to state to the jury their opinion of the law arising on the facts, then and not until then was it the intention of the judge to communicate to them this deliber-

Digitized by Google

ate opinion. Could this be done with any intention to injure or oppress the prisoner; if such was the intention of the act, then and not otherwise, it was criminal. In inquiring into the nature of this act, I confine myself now to the forming and delivery of this opinion, and to decide its innocence or criminality, we should consider it in relation to its *motives*, its *time and manner* and its *consequences*. If nothing partial, oppressive or corrupt is to be found in any of these, I know not in what or whence the criminality is to be established. In deciding, sir, upon the *motive* which prompted the judge to this act, we must look for materials in the testimony: by this we must be governed, and not by the imputations, surmises and constructions of our opponents, however eloquent and ingenious. The judge and his motives are not only strongly denounced in the article, but have also had the same fate from the mouths of the managers. I take the evidence for my guide, and I know it will be the guide of this honourable court.

What then, sir, did judge Chase declare himself to be the reasons which induced him to form this opinion, to reduce it to writing, and to hand it to the counsel? And permit me here, sir, to state, that in all criminal prosecutions for an act equivocal in itself, and whose character of guilt or innocence depends upon the *intention* with which it was done, the declarations of the party, made at the time, are always received in evidence to ascertain and fix the true character of the act; and the fair and legal explanation of the act is taken and derived from such declarations of the party, if not disproved by other evidence. What then did judge Chase himself say of his intention and motives in relation to this opinion? Mr. Lewis states that on this occasion judge Chase said, that he had

Digitized by Google

understood that at the former trial *there had been a great waste of time* on topics which had nothing to do with the business or case, and in reading common law decisions on the doctrine of treason, as well as under the statute of Edw. 3d before the revolution; and also relating to certain acts of Congress for crimes less than treason. That *to prevent this in future*, he or they had considered the law, made up their minds and reduced it to writing. And in order that the counsel might govern themselves accordingly, had ordered three copies to be made out, &c. &c. Here then the judge, at the time of the act now charged to proceed from a corrupt and partial intention, declares in unequivocal language what were his true motives. His object was to prevent an unnecessary waste of time in a court, where a vast deal of criminal and civil business was then depending and waiting for trial. This was the motive, and the only motive declared and avowed by the judge, at the time he delivered this offensive paper, and unless it be disproved by the evidence or the circumstances of the case, it must be taken to be the true one. It is not a subject of enquiry now whether the reason he assigned for this proceeding be a good or a bad one: it is enough to our purpose that it most certainly is neither partial nor corrupt. As the motive was not partial, so neither was or could be the act oppressive to the prisoner, unless the judge, in executing his design of preventing the waste of time, pursued it to an unreasonable extent. If he obstructed only the introduction of irrelevant matter, and did not exclude any thing that could and *ought* to have benefited the prisoner, he was guilty of no injustice or impropriety. If the proper and legal rights of the counsel of the prisoner were curtailed to his injury, there was certainly injustice done; but if nothing more than

Digitized by Google

wholesome and reasonable restrictions were imposed, to the manifest advantage of the general business of the court and of other suitors there, without any unjust detriment to John Fries, then not only the motive was correct, but the act was highly laudable. And such was undoutedly the case. If we go no further than Mr. Lewis's testimony on this subject, every idea of an intention on the part of the judge to injure or oppress John Fries is done away. As far as the judge declared himself his intention was pure and correct, and we cannot say that in the execution of this correct intention, he would have carried it to such excess as to produce oppression and injustice. The design was crushed in embryo: as far as we are acquainted with it, it is fair and clear of oppression, and we are not authorised to presume that *if* it had proceeded farther, it would have changed its character and become partial and corrupt. It is well known in Pennsylvania, that the loudest clamours are made against our courts for the delays of justice and the unreasonable time spent in the trial of every cause. These complaints had doubtless reached the ears of the judge; there was an enormous list of civil causes then before him, and he presumed that any expedient fairly to save time, would have been acceptable to every body, to counsel as well as to suitors. I have as yet considered this part of the case, only in its most unfavourable aspect to the respondent. Upon turning to the testimony of the other witnesses, its complexion becomes much more mild and unexceptionable. The suggestion, that this opinion made up by the court, and handed to the counsel, was declared to be final and conclusive upon them, and that no argument in opposition to it was to be permitted or heard, rests wholly and solely on the recollection of Mr. Lewis. Mr. Dallas was not in

Digitized by Google

court at the time it is supposed to have happened; no other witness of all that were present have any remembrance of any such declaration, and two witnesses expressly disprove it. Mr. Edward Tilghman states that judge Chase declared that the court had maturely considered the law arising upon the overt acts charged in the indictment against John Fries. That they had reduced their opinion to writing; that he understood a great deal of time had been consumed upon the former trial, and that *in order to save time*, a copy of the opinion of the court would be given to the attorney of the district; another to the counsel of the prisoner, and that the jury should have a third *to take out with them.* Mr. Tilghman further states that previously to the throwing of the papers on the table, and at the moment it was done, the judge expressed himself in these words, "Nevertheless or notwithstanding counsel will be heard." Mr. Rawle, a witness examined, as well as Mr. Tilghman on the part of the managers, gives the same account of the declared motive of the judge in preparing this opinion, to save time, as much had been lost at the former trial; and states that the judge said the court had determined to express their opinion in writing on law, *that they might not be misunderstood.* Here we find the reason not only for forming the opinion, but for reducing it to writing also. The court, continues Mr. Rawle, observed, they had therefore committed their opinion to writing—that the clerk had made three copies, one of which should be given to the district attorney; one to the counsel for the prisoner, and one the jury *should take out with them.* To put this part of the transaction beyond doubt, and strengthen, if possible, the character it now bears, I beg this honourable court to advert for a moment to Mr. Meredith's testimony. He too states that the judge

Digitized by Google

declared the court on great deliberation had formed an opinion on the law on the overt acts set forth in the indictment—and that *to save time and prevent mistakes*, this opinion was reduced to writing—the copies to be distributed as mentioned by the other witnesses. He further expressly avers that the judge when he threw down the papers declared that the giving of this opinion was not intended to preclude the counsel from being heard, or from expressing any objections to its correctness. After this mass of concurring testimony can the motive of the judge in forming and delivering this opinion be misrepresented or misunderstood; and can it now be believed or pretended that it was done, as the article charges, to prejudice the mind of the jury against John Fries before counsel had been heard in his defence? In order to bear up this charge against this weight of evidence and support Mr. Lewis's testimony in discredit of that delivered by the other witnesses, the managers who have spoken to this part of the case pretend that Mr. Lewis should be most relied upon, because most interested in the transaction. This interest sir, may have given a false colouring and appearance to the conduct of the judge, and his anxious zeal for his client may have represented the conduct of the court to his mind in harsher views than it deserved. I have always understood that those witnesses were most to be relied upon who were most cool and least interested in the transaction to which they testify. But the ingenious gentlemen invert this rule. But, sir, I have no intention of making a comparison between the credibility of these witnesses, they are all respectable above suspicion. It is a question of memory and not of character between them, and we must judge from various combinations of circumstances in ascertaining the respective correctness of memory. Mr.

Digitized by Google

Lewis himself most candidly declared his memory to be very uncertain and imperfect of distant events. Besides Mr. Tilghman and Mr. Meredith positively aver that the judge said, counsel would be heard on the correctness of that opinion. Now Mr. Lewis does not and cannot say that the judge did not say so, but his evidence is no more than this, either that he did not hear it at the time, or that he does not remember it now. I refer the honorable managers to their own rule about affirmative and negative testimony. In the Baltimore case, a single, solitary, unsupported witness (Mr. Montgomery) swears to a declaration of the judge, which some fourteen or fifteen respectable witnesses both for and against this prosecution, with equal and better opportunities of hearing all the judge said at that time, declare was not, to the best of their knowledge, uttered by the judge, nor any thing like it. Now say the managers, this single affirmative Mr. Montgomery is more to be depended upon than all the other witnesses put together—And if any body can think so, let it be so. But in Fries's case, we produce two affirmative witnesses against one negative witness, who testifies himself to the imperfection of his memory.

I presume, sir, I have most firmly established the point that the judge, in making up this opinion, had really and truly no other object or motive than to prevent a burthensome and useless waste of time. And sure I am, that whoever attended the first trial of Fries, would see the necessity of some regulation for this purpose. How then did the judge carry this intention into execution? The opinion of the court on the points likely to arise in the case, was put into writing and delivered to the counsel. Was this any disadvantage to them? Was it not rather a friendly guide to them, by which they might shape their argument so as best to

Digitized by Google

meet the points of difficulty, and serve their client. The court furnish each side, as well the United States as the prisoner, with copies of this opinion. This would have the effect to regulate and confine the argument on both sides to the proper channel, to the real points of difficulty, and prevent a wild, devious and useless extension of the argument into matters wholly irrelevant. It was surely an advantage to Fries's counsel thus to know the opinion of the court on the points of law in their case, and thus to have an opportunity of meeting and repelling it. If they would convince the court or jury this opinion was erroneous, they would succeed for their client. But if the court had permitted the counsel to take the usual course, and had kept their own opinion in close reserve, without any intimation of its direction, until the argument was closed, and had then delivered it to the jury, as unquestionably they might have done, and this opinion had contained some points which had been overlooked by the counsel, surely it would have been more prejudicial to the prisoner than the course that was pursued. The jury would naturally take the law from the court, and if therefore, the judge had intended to have oppressed John Fries, he would have succeeded better by reserving his opinion, concealing it from the counsel, permitting them to flounder on in the dark, and then in his charge to the jury, dictate the law to suit his partial and oppressive purpose. Would any gentleman of the law, about to argue a case before a court, think himself aggrieved, if the judge were previously to inform him of the ideas he entertained of the case, with full liberty to controvert them? It would be esteemed a favor.

You will be pleased to bear in mind, sir, that this paper containing the opinion of the court, was not read, nor was there any declaration whatever

Digitized by Google

of its contents or substance. It was known to none, it was intended to be made known to none but the counsel for whose use it was designed. How then could it produce any prejudice to John Fries? No attempt was made, no intention was manifested to read it. It was privately handed to Mr. Lewis. How then did it become public, in what manner were copies distributed to various hands? Not, sir, by the court, but by the counsel of John Fries. Mr. Lewis, in a moment of real or affected indignation, threw the paper from him, declared his hand should not be polluted by it, and cast it upon the table of the court, and it does not appear that to this hour he knows the contents of the paper he so hastily condemned. Several gentlemen of the bar by this means got hold of it and some copies were taken. But for this conduct on the part of Mr. Lewis, nobody ever could have known the contents of the paper or the opinion of the court. It was this that gave publicity to the opinion, and extended a knowledge of its contents, not only without the design and concurrence of the court, but decidedly against them. The act of the court was thus thrown into a different course and direction from what was intended or contemplated by them.

What then, sir, is the whole amount of the crime of the judge on this occasion? That he, a law judge, had been bold enough to form an opinion—not on John Fries's case, or the facts or circumstances of it, for he knew them not; but on certain abstract points of law, without first consulting and hearing Messrs. Lewis and Dallas.—And further, he had not onl yformed such opinions, but he had the audacity to put them into the hands of these gentlemen, which, in the article of impeachment, is called "delivering the opinion." The judge, then, on mature deliberation, from a full

Digitized by Google

consideration both of English and American precedents and decisions, had really made up his mind upon what overt acts would constitute the treason of levying war; and *to prevent mistake*, he had reduced this opinion to writing, and for the information of the counsel on *both sides* (no partial selection) he gave a copy of this opinion to each of them; and *intended* to give another to the jury to *take out with them*. The jury should have this opinion where they could not mistake it, instead of their memories where it might be misunderstood. Is not this, sir, a fair and just epitome of the facts given in evidence? Is it not the full measure and amount of the judge's crime and corruption? If the judge had a right to have any opinion of his own on the case, and if the opinion he formed was a correct one, and it is admitted or at least not denied to be so, where or whence could any injury arise from it to John Fries or his counsel? The opinion is supported by English authority, and by the highly respectable names of Judges Paterson and Iredell. And this opinion judge Chase had an undoubted right to give to the jury. He never intended to give it until the argument was closed, and then he designed to vary from the usual mode of charging juries, only in this, that to *prevent mistake* and for more certainty, he would deliver in writing instead of verbally. Yet the article charges that in consequence of the forming and delivering this opinion in this illegal manner, John Fries was convicted and sentenced to death. The undisputed correctness of this opinion wipes away every idea of an intention to injure or oppress John Fries. No injustice could result to him from a legal and correct opinion, which must finally have ruled the case, delivered at any time and in any manner. There might be some inattention to usual forms, but there could be no substantial in-

Digitized by Google

jury. An opinion thus anticipated, if manifestly unsound and erroneous and against the prisoner, might carry some suspicion of unjust prejudice, but how *corrupt intentions* are to be proved, manifested or executed by *correct opinions*, is to me inexplicable. The judge had taken much labour and particular pains to inform himself on the law of the case. He would not trust himself on hasty opinions made up at the moment when the life of a fellow citizen was at stake, and might be the forfeit of an error; and he therefore carefully examined the law and deliberately took an opinion—For this unusual attention, he deserves thanks and not impeachment. If knowledge of the law be a crime in a judge, ignorance is his best recommendation; and that judge is most worthy and best qualified for his office, who possesses no opinions of his own on any legal subject, but presents himself as a scholar to be taught by the counsel, and has no impressions but such as they are pleased to give him. I mean not to pass a sentence of condemnation on the views or conduct of the counsel of Fries. Their sole object and anxiety were to save the life of their client; and if they believed they could better effect this end by taking fire at the conduct of the court, by exciting a strong feeling and prejudice against the mode of proceeding, and by involving the court in embarrassment and difficulty, it was for them to judge how far they might pursue this object by such means, and to their own judgment I submit it. It is not easy to say how far counsel may fairly go in such a case, and when the life of the client is in issue, much more will be allowed than in common cases.

We have heard much about the agitation of the bar on this occasion. The particular cause of it has not been clearly explained. It might have been produced by the demeanour of Mr. Lewis,

Digitized by Google

which from his own account was violent and indignant, or it might have been the mere bustle produced by the different efforts that were made to get hold of the noxious paper which Mr. Lewis cast from him with so much feeling as too foul for his hand; or from a combination of these with other causes. Another circumstace equally immaterial, has been dignified with much importance by the attention the managers have bestowed upon it. I mean the *novelty* of the proceeding. Every witness was asked in solemn form, "Did you ever see the like before?" "How long have you been a practising lawyer?" "How many criminals have you defended?" "Was not this mode of forming and giving opinions by the court a novelty to you?" Granted—it was a *novelty*—I say granted, for argument's sake—it was a novelty; and what follows? Is it therefore impeachable? Every innovation, however just and beneficial, is subject to the same consequence. But, sir, if this novelty proceeded not from impure intentions, and was not followed by oppressive or injurious consequences, where is its injustice or criminality? There were many other novelties in that trial. It was a novelty that a man named John Fries should commit treason, and be tried and convicted for it. I never heard of precisely the same thing before. It was a novelty that counsel should desert their cause in the abrupt manner in which it was then done. But I presume it will not be pretended that these things were wrong merely because they were novel; much less that a judge is to be convicted of high crimes and to be removed from office for a harmless novelty—The articles charge not the judge with innovations and novelties in legal forms, but with depriving John Fries and his counsel of their constitutional rights; and if he has not done this, the rest is of no importance now. But

Digitized by Google

what is this strange novelty that excites so much interest and alarm? Is it that a law judge had a law opinion and was capable of making it up for himself without the assistance of learned counsel? I hope not. I should be sorry to suppose this is a novelty in the United States. Was it then the reducing this opinion to writing, putting it on paper with pen and ink that makes the dangerous novelty? To have the opinion is nothing; but to write it constitutes the crime. And yet, sir, where is the difference to the prisoner; except that in the latter case there is more certainty; less chance of misapprehension and mistake on the part of the jury, than when it is delivered to them verbally. It should be recollected, sir, and I am sure it is too important to be forgotten by this honourable court, this written opinion contained all the limitations and discriminations on the law of treason which could serve the prisoner, as well as those which might operate against him. But, sir, I deny that there was so much novelty either in forming this opinion or in reducing it to writing, as is pretended. Is it uncommon for judges to state their opinions on particular points of law to counsel, even before argument, for the direction of their observations? And was it ever before considered a prejudication of the case or an encroachment upon the rights of the bar? In criminal courts the practice is constant and universal. Previous to the trial of the cases of treason after the restoration of Charles II. the judges of England met together, and did form and reduce to writing opinions, not only upon the mode of proceeding upon the trials, but also on all those questions or points of law, which they supposed would arise and require their decision in the course of the trials. See Kelynge's reports, pa. 1, 2, &c.—11. Here the judges met in consultation ex-

Digitized by Google

pressly for the purposes now deemed so criminal in judge Chase, and took to their aid the king's counsel. Our judge did not take to his assistance the attorney of the United States in forming his opinion; nor did the judges in England deliver to the counsel of the accused, the result of their deliberations, but doubtless it would have been received as a favor if they had. In the only two points of difference, therefore, between the two cases, we have most decidedly the advantage.

But, sir, how can the proceeding of judge Chase, in *principle* and *effect*, be distinguished from the common and universal practice of charging grand juries, on the legal nature and description of the crimes to come under their notice? When a judge is about to hold a criminal court, he is particular to introduce into his charge those very offences, and his opinions upon them, which by information or otherwise, he supposes will be brought before the court. The opinion of the judge in such cases is formed, is reduced to writing, and is publicly delivered in the presence of all the jurors, both grand and petit, but never was before conceived to be objectionable. Nor was it ever before supposed to be a prejudication of any man's case, who might afterwards be tried for an offence thus defined. Judge Chase stated what acts in his opinion, would, in construction of law, amount to treason in levying war; but whether those acts and the necessary intention which must accompany them, would be proved upon John Fries or any body else, was left quite at large to be decided by the jury on the evidence. In Hardy's trial, pa. 13, chief justice Eyre states to the grand jury, "Jurors and judges ought to feel an extraordinary anxiety that prosecutions of this nature should proceed upon solid grounds. I can easily conceive, therefore, that it must be a great relief to jurors placed in

Digitized by Google

the responsible situation in which you now stand, bound to do justice to their country and to the parties accused, and anxious to discharge this trust faithfully; sure I am that it is consolation and comfort to us, who have upon us the responsibility of declaring what the law is in cases in which the public and the individual are so deeply interested; to have such men as the great sir Matthew Hale, and an eminent judge of our own times, who, with the experience of a century, concurs with him in opinion, Sir Michael Foster, for our guides.

"To proceed by steps—From these writers upon the law of treason (who speak, as I have before observed, upon the authority of adjudged cases) we learn, that not only acts of *immediate* and *direct* attempt against the king's life, are overt acts of compassing his death, but that all the *remoter steps* taken with a view to assist to bring about the actual attempt, are equally overt acts of this species of treason; even the meeting and consulting what steps should be taken in order to bring about the end proposed, has been always deemed to be an act done in prosecution of the design, and as such an overt act of this treason.—This is our first step in the present enquiry. I proceed to observe, that the overt acts I have been now speaking of have reference, nearer or more remote, to a *direct* and *immediate* attempt upon the life of the king; but that the same authority informs us, that they who aim directly at the life of the king, (such for instance, as the persons who were concerned in the assassination plot in the reign of king William) are not the only persons who can be said to compass or imagine the death of the king. "The "entering into measures which, in the nature of "things, or in the common experience of man-"kind, do obviously tend to bring the life of the

Digitized by Google

"king into danger, is also compassing and imagin-
"ing the death of the king;" and the measures which are taken will be at once evidence of the compassing, and overt acts of it."

Where is the criminality of such instruction and direction; but in what does it differ in principle and in all its possible consequences to the prisoner, from the conduct of judge Chase? The learned English judge thought he was obliging the jury, not encroaching upon them—by stating fully and precisely the legal construction of those acts which would probably be given to them in evidence to support the charges of treason. It is true the treason charged upon Hardy was not that of levying war—it was that of compassing the king's death. Now what overt acts amount to a compassing of the king's death, is a question of law resting upon long and established decisions and precedent. And judge Eyre thought it no crime to declare to the jury his opinion of the law in this respect. So in our case, treason by levying war, is a general constitutional definition of the offence; but the application of this general definition, and the fixing and describing such overt acts as amount to a levying of war, is matter of legal construction, depending upon a knowledge of former adjudications, which the judge was bound to know, or he was not worthy of his office, and which he was also bound to communicate to the jury. The difference in the cases is only here. Chief justice Eyre formed his opinion on deliberation and he reduced it to writing; but he also *publicly* delivered it with all the weight of his name and authority in the face of all the jurors and of the country. Whereas judge Chase gave his opinion privately to the counsel, to be at their disposal and discretion; to use it for the benefit of their client if they could; or to disre-

Digitized by Google

gard and suppress it if they thought proper. It might forever have been concealed from the jurors and from the world, if the counsel of Fries had not themselves made it public. This practice of delivering opinions on points of law in charges to grand juries, is not confined to the English courts. It is the same in the United States. The managers have pronounced a very deserved eulogium upon the official conduct and character of judge Iredell. The respondent has been referred to him as a bright example of justice and impartiality, and it has been lamented that with such an example before him, judge Chase should have so wandered from the path of rectitude. We take their standard of excellence. We agree to be judged by judge Iredell; and if I shew that this humane and learned judge really did the same thing for which the respondent now stands on his trial, I hope there will be an end of the complaint. On the first trial of this same John Fries for the same offence, judge Iredell actually committed, with some circumstances of aggravation, the same enormous crime for which judge Chase is now impeached. He did form an opinion on the law of treason, he did reduce that opinion to writing, and he did deliver that opinion, the same in substance, and nearly the same in words with that delivered by judge Chase. This bright example was before our eyes, he is now so, and let us be judged by him. In the charge delivered to the grand jury in 1799, who found the first bill against Fries for treason, speaking of those cases which he thought would come before the court, the judge says, "The only species of treason likely to come before you, is that of levying war against the United States. There have been various opinions, and different determinations on the import of those words. But I think I am warranted in saying, that if in the

Digitized by Google

case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether, (as for instance the land tax act, the object of their opposition) any forcible opposition calculated to carry that intention into effect, was a levying war against the United States, and of course an act of treason. But if the intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a higher offence may have been committed, it did not amount to the crime of treason. The particular motive must however be the sole ingredient in the case, for if combined with a general view to obstruct the execution of the act, the offence must be deemed treason."

Judge Iredell, therefore, so far from conceiving it to be a crime to have an opinion upon the law of treason in levying war and the overt acts which would constitute it, to reduce that opinion to writing and to deliver both to counsel and jury, seems to have considered it, as chief justice Eyre had done before him, to be his duty to do so. The opinion delivered by this respectable judge coincides entirely with that of judge Chase, and the manner of delivering was, on our opponents' principles, vastly more exceptionable. The novelty of this proceeding seems to have vanished on investigation. There is indeed one striking difference in the two opinions—That judge Chase goes more fully and clearly into the definition of the offence, and is more particularly careful to state those distinctions and discriminations which might serve the accused, and reduce his transgression to some smaller offence, provided they could appear in his case. He sets out not only the descrip-

Digitized by Google

tion and character of those overt acts which constitute treason, but enumerates also with equal care such as will not amount to that offence. If these favorable discriminations might in any way have been useful to the accused, they were put fully into the power both of the counsel and the jury.

The gentleman who opened the prosecution, (Mr. Randolph) took occasion to speak in very handsome, and I doubt not very deserved terms of applause, of a distinguished judge in Virginia. This same judge has published an edition of Blackstone's Commentaries, into which he has introduced a variety of his own opinions on the constitution and laws of the United States. If hereafter a person should be accused under the operation of some of those statutes on the construction of which judge Tucker has published his comments and opinions, would it be any impeachment of the justice and impartiality of this judge to say, he had made up his opinion, he had reduced it to writing, he had delivered it to the world and therefore he had prejudged the case. No, this would be a sort of reasoning even more absurd than the Richmond *non sequitur*. The honourable manager (Mr. Randolph) to enforce and exemplify his doctrines on this subject, put an analogous case. He stated that a judge holding a criminal court might properly give the legal description of murder, and the circumstances and ingredients that in point of law would constitute this offence. But, says he, he may not go on to apply this definition to the *overt acts* laid in the indictment. This I confess, is a *novelty* to me. I never before heard of overt acts in an indictment for murder. The general charge of the offence is laid in legal and general terms, but there is no specification of the particular facts and circumstances by which the charge is to be

Digitized by Google

supported. But suppose a judge, knowing that a man was coming before him for trial, accused of going into the street with a declared resolution to kill the first person he should meet; and this judge were to say to any person or in any place, verbally or in writing, that a killing under such circumstances was murder, and a full manifestation of malice in legal construction, would this be called a prejudication of the case? Is it not a mere declaration of the law existing and established long before the case, which it was the duty of the judge to know, to obey and to declare? If the facts proved before the jury brought the accused within the law, the consequence of conviction followed, not by the will of the judge, but by the sentence of the law; and while this question was left open, the case was in no wise prejudged. To explain this point still further, I will put the case of *libelling*. This offence, like that of treason, consists of two parts; the act and the intent. Would it be criminal in a judge, knowing that such a case was to come before him, to inform himself, if necessary, of the law of libels, to make up his mind upon the constituent parts of the offence, and to declare them to the grand jury, the counsel or any body else? Might he not be of opinion, and write and say, that a libel is a malicious defamation of any person in writing, in order or intending to excite their wrath, or to expose them to public hatred or contempt? Here the fact of publication must be proved and the malicious intent. And might not a judge state what in contemplation of law is a malicious and defamatory writing, and that if such an one is published with intent to injure and defame, it is in law a libel? Apply this doctrine to the case of Fries. May not a judge have an opinion and declare, that an insurrection of a body with intent or in order to

Digitized by Google

resist the execution of any law of the United States, and the carrying that intent into execution by actual force and violence, is treason against the United States by levying war? There is no prejudication in either case; the facts and the intent which constitute the crime, and on which the guilt or innocence of the accused depends, are left wholly untouched, and come without prejudice or bias to the jury. I have heard the phrase "prejudging the law" repeated over and over again. Judge Chase *prejudged the law* against Fries, we are told—I confess the phrase is a very singular one to me. I know not precisely how to understand it. I can comprehend what it meant when I hear of prejudging a man's case—in prejudging the facts of any case. But as to the law, I presume it is always prejudged; always settled, certain and ascertained. It is never a question in a case of murder, whether a killing with malice prepense is or is not murder. The law has prejudged that; and so in all other cases the question is, whether the facts proved bring the case within the law. And so it was in Fries's case, and upon that point judge Chase neither gave nor intimated nor had an opinion; for as the evidence had not been heard, he could not anticipate what facts would be proved.

I hope and trust, sir, that the first specification of this article is now disposed of to the satisfaction of this honorable court, and the complete justification of the respondent. Part of it, when tested by the evidence, turns out to be wholly unfounded; and the rest which is true, has been fully justified both on principle and by precedent. If there was some haste and error in the conduct of the judge, which however I neither believe nor admit, there was certainly no criminality in the act. There was nothing impure in the motive—nothing injurious in the consequence.

Digitized by Google

Suffer me now, sir, to offer you some observations on the second specification of the first article of impeachment. I hope it will not be necessary to trespass greatly on your patience in refuting it. It charges judge Chase with "restricting the counsel for the said John Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client." This charge consists of two parts; it complains of a restriction as to English authorities, and as to American statutes. I will consider them distinctly. First, sir, permit me to remark that these allegations are made to support the general charge of partiality, oppression and injustice. But what becomes of these pretences when we bear in mind the testimony of Mr. RAWLE, the district attorney, and always, and in every situation, a gentleman whose character, in all its relations both public and private, bears the first stamp of respectability, and fears no competition for credit. He has informed this honourable court that this restriction so grievously complained of, and now the subject of a criminal prosecution, was imposed upon him as well as upon the counsel of Fries. Is this the character or the conduct of partiality or oppression?—Does it evince that strong appetite the judge is said to have, to drink the heart's blood of this unfortunate German, and stain the pure ermine of justice with his gore. I have always understood by partiality in a judge, a favoring bias to one party to the prejudice of the other; but where a restriction is put equally on both sides, I cannot conjecture how it can be resolved into partiality or oppression. It will be seen presently that as far as this restriction could have any operation, it was friendly in

Digitized by Google

that operation to John Fries. But, sir, what was this restriction so much complained of and now magnified into a high crime? That certain English decisions in the law of treason, made before the revolution of 1688, should not or ought not to be read to the jury—And pray, sir, what were these decisions? I will take their character from Mr. Lewis himself, and no man is better acquainted with them. He says they were decisions of dependent and corrupt judges, who carried the doctrine of constructive treason to the most dangerous and extravagant lengths. True, they were so—sanguinary, cruel and tyrannical in the extreme—and could the exclusion of such cases injure John Fries?—If cases which extenuated and softened the crime of treason had been rejected, he might indeed have suffered; but how he was or could be injured by keeping from the jury those cases which aggravated his offence, I am really at a loss to learn. The restriction there was on the United States. Had they been adduced by the attorney general, no doubt they would have been ably answered by the defendant's counsel; but the ability of the counsel was not inferior to Fries's counsel; and if judge Chase had indeed a design to oppress and injure John Fries, and to convict him on strained constructions of treason, his best policy would surely have been to have suffered these cases to have come forward, and if supported by his authority and the talents of the counsel of the United States, they might have had their influence with the jury, notwithstanding the able refutations they might have received. But why and for what good purpose did the counsel desire to read these cases, operating, if they operated at all, directly against the life of their client? Why would they fatigue the court and impose upon the jury with those wicked and ridiculous decisions against a man who

Digitized by Google

wished his stag's horns in the king's belly—and another, who declared he would make his son heir to the crown. Sir, there could have been but one object in this attempt. It was this, to excite such horror in the minds of the jurors by reciting these tales of tyranny and blood, as would create a general prejudice in them against all the laws of treason. The abhorrence which would be honestly given to such extraordinary cases of cruelty practised under the law of treason, they hoped would extend itself to all cases of treason, even the most just and upright. I know another and ingenious colouring and pretence has been given for this design, this strange anxiety to read cases, which so strongly support prosecutions for treason. It has been said by Mr. Lewis, not here as a witness, but in Philadelphia as counsel for John Fries, that his object in desiring to read these extravagant cases was of this sort. That many of the decisions on the law of treason made since the revolution of 1688, and which are received as authorities in modern courts, were actually grounded on the iniquitous cases decided before the revolution; and therefore, says Mr. Lewis, we wished to lay these cases before the jury that they might place no reliance on those since the revolution, which were derived from them. Could the gentleman be sincere in this pretence? How far would he carry it? To all decisions since the revolution, and are we to have no adjudications on this subject which may be relied upon as sound, legal and virtuous? I apprehend he does not mean so much. He desired I presume only to discredit such of the English decisions since the revolution, as were derived from those corrupt sources alluded to. Then most assuredly, he was premature in his attempt to read these precious cases. If the district attorney should read, and rely upon any case decided since the revolution to

Digitized by Google

convict John Fries, and Mr. Lewis could trace that decision back to the horrible times spoken of, and shew that it was derived from and grounded upon the opinions of those corrupt and dependent judges, it would surely have been competent for him to do so, and no court would have attempted to prevent him. But that he is to deluge the court and jury with a mass of trash and corruption, and so declared to be by himself, by way of anticipation and when no necessity had occurred or probably would occur to justify it, could not be endured by any court knowing its duties and respecting its dignity. These cases are law, or they are not law. If the former, their operation and influence were against the prisoner; if the latter, the court should not suffer them to be read to mislead and impose upon the jury. So far, sir, and I shall trouble you no further, on the exclusion of these English statutes. Now, as to the statutes of the United States. That any such restriction was laid on the counsel of John Fries, rests wholly and entirely on the testimony and recollection of Mr. Lewis. I will, sir, first consider the nature and extent of this charge against the respondent, supposing the fact to be so. I presume it will be granted to me that a judge has some sort of authority in a court; that he does not sit there as a mere cypher, without power or command. Among the acknowledged powers of a judge, is that of regulating and directing in some degree the argument before him, and preventing the introduction of matter either grossly improper or palpably irrelevant to the issue. If then it be demonstrated that these statutes of the United States had really and truly nothing under heaven to do with the trial of John Fries, I hope the judge will not be condemned for excluding them. John Fries, sir, was indicted for the treason of levying war against the United States, and for no other offence.

Digitized by Google

This crime is created and defined by the constitution of the United States. It became the duty of the attorney of the United States to shew to that court and jury, that the prisoner had been guilty of the treason charged in the indictment according to its definition and description in the constitution, or the prosecution must fail. If, on the other hand he did shew this to the satisfaction of the court and jury, John Fries must necessarily be convicted. Now, sir, what possible influence or control could any act of Congress have over the character of a crime defined in and derived from the higher authority of the constitution. The act of Congress could not enlarge, restrict, or in any way alter or affect the constitutional description. To what proper purpose then could any Act of Congress be read? Why sir, we have heard something about a legislative construction of the constitution; and that these acts of Congress defining sedition and other offences, might be used and were important to shew what was intended by the constitution in the description of treason. In the first place, sir, Congress in passing these statutes never had the most remote idea or intention of giving any sort of construction or opinion upon the law of treason; and if they had such an intention, it was beyond their powers and rights, and should be wholly disregarded, not only by that court, but by this. The construction of the constitution, in common with every other law, belongs exclusively to the judiciary, as best qualified both from its permanency and independence as well as from legal learning to exercise so important a right. The necessity of a power existing some where to judge of the constitution, and of the conformity or non conformity of laws to the provisions of it, results from the very nature of a written constitution. It is in vain we have an instrument paramount to ordinary legislation, if

Digitized by Google

there is no authority to check incroachments upon it, and there is no department of government with whom this power can be so safely lodged, or by whom it can be so ably and impartially exercised, as the judiciary. If the legislature, the very branch of government most controuled by the constitution, and intended to be so, shall be permitted to assume the wide and unlimited right of construction, the constitution will sink at once into a dead and worthless letter; moulded into various, fantastic shapes at the will of the legislature, and purporting one thing to-day and another to-morrow, and nothing at last. But Congress, I repeat sir, in passing the sedition law, had no intention whatever of giving their construction to the constitutional description of treason, or of effecting or touching it in any way. The counsel of Fries were therefore about to use or abuse the act of the legislature to purposes never contemplated or intended. Should the court suffer a delusion of this sort to be practised upon a jury, equally disrespectful to the court and to the Congress? It was not Judge Chase only who thought these statutes of the United States totally irrelevant to the case of Fries. They had been solemnly adjudged to be so, after every exertion of the talents of the counsel to shew their application and force—I refer you, sir, to the opinion of Judge Iredell on the first trial of Fries.

"An act of Congress which I have already read to you (that commonly called the sedition act) has specially provided in the manner you have heard, against combinations to defeat the execution of the laws. The combinations punishable under this act must be distinguished from such as in themselves amount to treason, which is unalterably fixed by the constitution itself. Any combinations, therefore, which before the passing of

Digitized by Google

this act, would have amounted to treason, still constitute the same crime. To give the act in question a different construction, would do away altogether the crime of treason as committed by levying war, because no war can be levied without a combination for some of the purposes stated in the act, which must necessarily constitute a part though not the whole of the offence.

" This, gentlemen of the jury, is an indictment against the prisoner at the bar, for levying war against the United States; the first enquiry therefore is, what is meant by these words of our constitution, " Treason against the United States, shall consist only in levying war against them," &c. These words are repeated verbatim, I believe, in an act of Congress, called the Judiciary Act, defining the punishment of the crime of treason, pursuant to constitutional authority. This crime being defined in the constitution of our country, becomes the supreme law, and can only be altered by the means therein pointed out, and not by any act of the legislature; and, therefore, the repetition of the words of the constitution in the judiciary act is quite unnecessary, as the only power left to Congress over this crime was, to describe the punishment: the same act, in another part, makes provision for the method of trial. Agreeable to their power, Congress have described the punishment, and thereby declared the crime to be capital. It is clear, therefore, that, as the constitution has defined the crime, the Congress, drawing its sole authority from that constitution, cannot change it in any manner, particularly as it is so declared; yet the counsel for the prisoner say, that the legislature have given it a legislative interpretation, and that their interpretation is binding on this court. They say that Congress did not mean to include the offence charged upon the pri-

Digitized by Google

soner at the bar, under the definition of levying war; because the sedition act describes a similar offence, and because a rescue is provided for in another act, the punishment extending no farther than fine and imprisonment. Several answers may be given to remove these objections:

"First, if Congress had intended to interpret these words of the constitution, by any subsequent act, they had no kind of authority so to do. The whole judicial power of the government is vested in the judges of the United States, in the manner the constitution describes; to them alone it belongs to explain the law and constitution; and Congress have no more right nor authority over the judicial expositions of those acts, than this court has to make a law to bind them. If this was not an article of the constitution, but a mere act of Congress, they could not interpret the meaning of that act while it was in force, but they may alter, amend, or introduce explanatory sections to it. In this we differ from the practice of England, from whence we received our jurisprudential system in general; for they having no constitution to bind them, the parliament have an unlimited power to pass any act of whatever nature they please; and they, consequently, cannot infringe upon the constitution. The very treason statute of Edward III. itself, contains a provision giving parliament an authority to enact laws thereupon, in these words: "Be- "cause other like cases of treason may happen "in time to come, which cannot be thought or "declared at present: it is thought, that if any "such does happen, *the judges should not try "them without first going to the king and parlia- "ment, where it ought to be judged treason, or "otherwise felony*." On this point Sir Matthew Hale was very careful, lest constructive treason should be introduced.

Digitized by Google

" This, gentlemen, you will observe, only relates to any case not specified in that act. But, on the occasion now before you, it is not attempted, by any construction or interpretation, that any thing should be denominated treason, that is not precisely and plainly within the constitution. No treason can be committed except war has actually been levied against the United States.

" But farther, nothing is more clear to me than that Congress did not intend in any manner whatever, to innovate on the constitutional definition of treason, because they have repeated the words, I think, verbatim, in their own act, with regard to the rescue and obstruction of process which is mentioned in the act alluded to: it will not be pretended, by any man, that every rescue, or every obstruction of an officer in serving process, or even both together, amounts to high treason, or else to no crime at all: No; the crimes are differently specified, and rescue or obstruction of process may be committed without that high charge. This, I think, was sufficiently explained by the counsel for the United States."

Will it be pretended, sir, that counsel have a right to read any thing before the court which they may find in a law book? Is there any thing of such peculiar dignity and privilege in the statutes of the United States, that any of them may at all times and on all occasions, whether pertinent or not, be read in a court of justice; and is it a high crime in a judge to prevent it? Suppose the counsel had chosen on the trial of John Fries to amuse themselves with reading the revenue laws of the United States; would the mere circumstance of their being bound in our statute book have given them such a sacred character that the court would be bound to listen with the most respectful attention to such an absurd waste of time? I do not he-

Digitized by Google

sitate to aver that the revenue laws have full as clear and proper an application to the case of John Fries as either of the statutes the counsel were so anxious to produce.

But, sir, although judge Chase undoubtedly believed that these statutes of the United States had no sort of application to the case before him, and we contend that he would have been wholly justifiable in excluding them from the discussion, yet we deny most explicitly that he did so. The respondent never declared that these laws should not be read or referred to on that occasion. The proof of the fact rests entirely on the recollection of Mr. Lewis. Among the numerous spectators of this transaction not a man but Mr. Lewis has been produced to sustain this charge now deemed so important. Mr. Lewis has doubtless declared the fact as he believes it—but, sir, when we recollect the agitation of this gentleman as described by himself—the strong state of feeling or passion into which he was excited, the length of time and the acknowledged frailty of his memory—and when to this we add that something was probably said about the irrelevancy of these statutes, we shall find sufficient reason to believe that Mr. Lewis has in this respect, fallen into a mistake—opposed to this imperfect recollection we have Messrs. Rawle, Tilghman, Meredith, Biddle and Ewing, all possessing an equal opportunity with Mr. Lewis to hear and to understand what passed from the court; and from their cool and disinterested situations less likely to receive unfounded or discoloured impressions. I cannot avoid reminding you, sir, that Mr. Tilghman and Mr. Rawle are witnesses summoned and examined on the part of the United States, and although the honorable managers have thought proper to claim only Mr. Lewis and Mr. Dallas, and to treat the other gentlemen as witnesses for the

Digitized by Google

respondent, they are nevertheless entitled to the full regard and respect, whatever it may be, attached to the witnesses for the majesty of the people. The five gentlemen I have named, were all of them in court during the trial of John Fries, and at the time Mr. Lewis supposes this restriction to have been laid upon him—And yet not one has any recollection of any such prohibition—I believe they or some of them state in decided terms, that none such was made. If this comparison of the recollection of five witnesses against one, who himself testifies to the imperfection of his memory, leaves any doubt about the truth of the fact, I can refer this honorable court to a written document drawn up by Mr. Lewis, in conjunction with Mr. Dallas, which must put the question to rest. When there is such a contradiction in the testimony of such respectable witnesses, it is a great relief to my mind to have some permanent voucher to refer to, to decide the difference.—I allude, sir, to the letter addressed by Messrs. Lewis and Dallas to Mr. Lee, then attorney general of the United States. This lettter was written in May, 1800, soon after the trial of Fries, and when every circumstance was fresh in the memory of Mr. Lewis. This letter was written in consequence of a communication from Mr. Lee, stating "that the case of Fries was before the President—that *all the information* was wished, which could assist in making a proper decision upon a claim for mercy and pardon; for which purpose Mr. Lee desired to know the grounds on which the counsel intended to have enforced the defence." In consequence of this solemn and important call from such high authority, and for such an interesting purpose, Mr. Lewis writes to Mr. Dallas—states that in justice to "*poor Fries*" as well as to themselves, they ought to make the desired communication—that

Digitized by Google

they should state their intended arguments, &c. &c. and that they should state "in decent and manly terms *our reasons for declining any interference in the trial*"—he then requested from Mr. Dallas "*every communication* likely to render service to *poor* Fries."—Turn then, sir, to the letter addressed to Mr. Lee, with all these friendly dispositions on the part of Mr. Lewis, with all the anxious desire he had to serve poor Fries, and with all the aid of Mr. Dallas in making the statement, which was to contain *all* their information on the subject, and *all* their reasons for declining to interfere in the trial. We find, sir, in this important letter, that they informed the Preisident that the "cause was prejudged" by an opinion they were wholly unacquainted with—by a paper they had never read and knew not the contents of—and the jury were also *prejudged* by this opinion, although they knew not what it was.—But, sir, we do not find any complaint whatever—nay, not the slightest suggestion that the court prevented or forbade the reading of these statutes of the United States, or restricted the counsel from making any use of them they thought proper.—With the manifest disposition of these gentlemen, in writing this letter, with the object before them for which it was required, and the uses they intended should be made of it, uses which they anticipated at the moment they abandoned the cause, is it probable so important a circumstance would have been omitted if it had really occurred.—I refer you and this honorable court, sir, to the following pages of the evidence printed at the last session of Congress for the use of the House of Representatives—pages 21, 24, 25, 26, to 32.

May I not now flatter myself, sir that all the criminality charged upon the respondent, in the second specification of the first article of impeach-

Digitized by Google

ment is washed away from the minds of this honourable court—Under this hope and impression, I will proceed to consider as briefly as possible the third and last specification. In this the judge is charged with "debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give." This charge is absolutely unfounded and untrue, and is, in all its parts, most completely disproved by the evidence. As to debarring counsel from being heard, I need only refer you, sir, to the testimony of Messrs. Tilghman and Meredith, who expressly swear, that judge Chase, when he threw down the paper containing the opinion the court had formed on the law, explicitly declared, that nevertheless counsel would be heard against that opinion. It is indeed true that Mr. Lewis seems throughout the business to have been under an impression that nothing would be heard in contradiction to that opinion; and that his professional rights were invaded. But this appears to be a hasty and incorrect inference or conclusion of his own from the conduct of the court. He wholly misapprehended the court, and has charged his misapprehension to their account. This is the usual effect of such precipitate proceedings. The managers have greatly relied on this circumstance; they urge that Mr. Lewis, through the whole of the affair and in all he said concerning it, took for granted and stated that he was debarred from his constitutional privileges—He did so—but he did so under a mistake of his own, not proceeding from the court. It is not on-

Digitized by Google

ly that no other witness speaks of any such restriction, but expressly negative it and say, some of them at least, that none such was imposed; but Mr. Rawle has further informed you, that it appeared to him throughout the business that Mr. Lewis had wholly misunderstood the court and mistook their intention. But surely, sir, we are not to be condemned because we have been misunderstood; especially as the mistake seems to have been peculiar to Mr. Lewis, and no other witness fell into the same error. I rely most implicitly on Mr. Rawle's testimony, not only from the strength and correctness of his character, but from the unusual pains he took to be accurate in his knowledge of this transaction. His notes are copious, connected and satisfactory, and although he has no notes of the first day's proceeding, yet he seems to have given an uncommon and cautious attention to every circumstance to which he has testified. This gentleman negatives every idea of any restriction upon the arguments of counsel, and is supported by every witness but Mr. Lewis. If any doubt can remain upon this subject, I am happy to have it in my power to refer to a written and unchanging document—which destroys the third specification, and demonstrates not only that the counsel were not prohibited from addressing the jury both on the law and the fact, but also that the right of the jury to decide both the law and the fact was most largely and explicitly avowed and declared to them. I beg to refer this honourable court to the second exhibit filed with the respondent's answer. It contains this very opinion so scorned by the counsel of Fries, and from the pollution of which they shrunk with horror. If they had read it before it was thus indignantly condemned—if it had been understood before it was consigned to con-

Digitized by Google

tempt, and denounced as a violation of every valuable and sacred right, how much confusion, how much unnecessary discontent might have been saved and prevented. In this opinion then, will be found the sentiment, in these words: "It is the duty of the court in this and in all *criminal* cases, to state to the jury their opinion of the *law* arising on the facts; *but the jury are to decide on the present, and on all criminal cases, both the law and the facts, on their consideration of the whole case.*" Was there ever a more ample and explicit avowal of the rights of juries? Is there any friend to juries so extravagant as to contend or ask for more? The acknowledgment is as full as any man can require or the law would warrant. The judge, in thus admitting and confirming the right of the jury to decide both the law and fact, admits by inevitable consequence that the jury have a right to hear counsel both upon the law and facts. That which they are to decide upon, they must have information upon; and the court which declares the jury to be the tribunal to determine the *whole* case, never could have said in the same breath, that they should hear no argument on the case they were thus to determine. This monstrous absurdity, of which the judge can hardly be suspected, brings it to a certain conclusion, that Mr. Lewis must have mistaken the court; and that no such restriction was laid upon him or the jury as he has apprehended.

The charges, sir, laid in this first article of impeachment, are grounded altogether on the proceedings of what has been called the first day of Fries's trial; and most firmly believing that the whole of this proceeding on that day will bear the most scrutinizing enquiry, and stand on the strong ground of justification, I have been willing to meet the managers on that day's proceeding dis-

Digitized by Google

jointed from that of the following day. But, sir, it is most evident, that this is by no means a full or a fair examination of the judge's conduct on that occasion—When he is charged with a corrupt or partial intention to injure and oppress John Fries, when he is charged with a wilful violation of the rights of the counsel and jury, the whole of the proceeding should be brought into view, before we decide upon the character of any part of it. An attention, sir, to what passed on the second day, as it is called, of Fries's trial, will most abundantly prove that judge Chase never had intended any partiality or oppression against him; and certainly that if he had any such intention, he never carried it into execution or effect. And I trust I am safe in saying that the mere intention to commit a crime however gross or outrageous, unless carried into some sort of action or effect, constitutes no crime. A man may intend to commit a larceny, assault and battery, or any other offence; but while he abstains from the act, the mere intention cannot subject him to trial or punishment. The respondent then, discovering from the conduct of Fries's counsel, and the indignant hostility they assumed, that he was greatly misunderstood; that an arrangement he had adopted for the convenience of public justice, the reasonable expedition of the approaching trial, and the real accommodation of the court, the counsel and the jury, was construed and received as an oppression upon the prisoner, an encroachment upon the privileges of counsel, and a violation of the rights of the jury, in short, as a corrupt and polluted prejudication of the cause to be tried, and that the fair and upright intentions of the court were misinterpreted by a real or pretended mistake into the vilest purposes of partiality, resolved to destroy the formidable engine they saw erecting against the

Digitized by Google

court, and to remove at once all pretence for clamour or irritation. Granting the judge had been in error on the first day, what more could he or any man do, than to rectify the error as soon as it was discovered, and hasten to the right path before any injury could have resulted from his momentary deviation. But the honorable manager has told you he had sinned beyond the grace of repentance, and that no contrition, however sincere, could wipe away the offence. When I suffer such words as repentance and contrition to pass my lips, it is in quoting precisely the words of the manager. For my part I disclaim them. The respondent has done nothing that required the humiliation of repentance, or for which he now asks to be forgiven. Let him stand on his justification or stand not at all. But, sir, a part of that justification is that the corrupt intent charged upon him is disproved by his entire willingness to permit the counsel to manage their cause in their own way, if they disapproved of his, and by his full and candid retraction of the error, if any error had been committed. By adverting to the testimony of Mr. Rawle, this honorable court will see, how greatly judge Chase was surprized to find from conversing with this witness and judge Peters, that his conduct was viewed in so strange a light by Messrs. Lewis and Dallas. On making this discovery, altho' still convinced of the propriety of the proceeding, he does not obstinately adhere to it, but resolves to remove all possible cause of complaint, by withdrawing all the papers which had given rise to this astonishing irritation and violation. The papers were accordingly resumed, every copy collected, and the counsel, the prisoner and the jury were placed in the same precise situation as if these papers had never been distributed; with the most ample acknowledgment of all their rights, and the

Digitized by Google

most urgent solicitations to them to proceed in the enjoyment and exercise of them. But no, the counsel had taken their ground, and nothing could move them. John Fries had received their instructions, and with equal perseverance declined the aid of other counsel offered to him by the court repeatedly. Now, sir, let me ask you and this honorable court, on your consciences, not to be blinded by the management and finesse of ingenious counsel, what was the meaning of all this? What was the object of it? Did the counsel now believe they would not be fully heard in defence of their client both on law and fact? Did they now suppose themselves or the jury restricted in their rights, or that a just and impartial trial would not be had? Most certainly not. But, in the language of Mr. Lewis, they thought they had got the court into an error or a scrape, and they were determined to keep them there. What! says judge Peters, if we have done wrong, will you not suffer us to repair that wrong by doing what is right, by doing all that you have required? No, no, was the answer. Mr. Lewis has declared to you in the most ample and explicit terms, that they abandoned John Fries because they thought they took a better chance of saving him by this means, than they could have by any trial; and to use his own words in another part of this testimony, "we withdrew" says he, "from the defence of John Fries, because we thought it would best serve him, and we were not influenced by any other motive whatever." They had already, before judge Iredell, tried the efficacy of the full and unconfined exertion of their talents in his defence, and found how vain the attempt was. They were well satisfied no hope of success could be entertained on a fair trial of the merits of their case, both in law and fact, and they eagerly grasped any

Digitized by Google

occurrence, that, by operating on the passions, the humanity or the prejudices of mankind, might give to their client a chance for escape, which he could not look for in the merit of his own conduct. With this view, they most solemnly impressed upon the mind of John Fries the necessity of his maintaining the ground they had taken for him, and refusing the assistance of any other counsel. So well did these gentlemen know the court had no intention of oppressing John Fries, that in their communications to him, they anticipated the offer of other counsel to supply their desertion.

But, sir, there is one circumstance in this second day's proceeding, which has been introduced to shew, that the respondent continued the same tyrannical spirit with which he is charged on the first day, and which it may be incumbent on him to remove. I mean the "unkind menace," as it has been termed by one of the witnesses, used to the counsel of Fries, when the judge told them they would proceed in the defence at the hazard or on the responsibility of their characters. To ascertain the true nature of the expression, whatever it was, which fell from the court in this respect, I will refer to the same guide I have endeavoured to follow throughout my argument, I mean the evidence. The aspect of this pretended menace will then be changed into a complimentary confidence in the discretion of the counsel, or at least into no more than such a menace as every gentleman of the bar acts under in every case; that is, to manage every cause before a jury with a due regard to their own reputations; to urge nothing as law to the jury, which they are conscious is not law, and to introduce no matter which they know to be either improper or irrelevant. This, in its worst character, will be found to be the whole amount of this terrific menace. What account

Digitized by Google

does Mr. Lewis give of this occurrence? After stating that the court manifested a *strong desire* that he and his colleague should proceed in the defence of their client; that every restriction, if any had been imposed, was now removed, and that they were at full liberty to address the jury on the law and the fact as they thought proper; the judge said that this would be done "under the direction of the court, and at the peril of our own character, *if——we conducted ourselves with impropriety.*" And was it not so? And where is the criminality of saying so? Mr. Lewis did not consider this as a menace intended to restrict him in the exercise of the rights just before conceded him by the court, but rather as an unwarranted suspicion of his sense of propriety; for, says he, "I did not know of any conduct of mine to make this caution necessary."

The court perhaps thought his conduct on the day before did make it necessary. Let us now take Mr. Dallas's impression of this part of the conduct of the judge. This witness after testifying to the ample range, both as to law and fact given to the counsel by the court, states that the judge observed "they would do this at the hazard of their characters." This Mr. Dallas afterwards terms an "unkind menace." I think upon recurring to Mr. Lewis and the other witnesses, and to some considerations naturally arising from the manifest disposition of the court at that time, it will be concluded that Mr. Dallas has mistaken the nature and character of this act of the judge, when he describes it as a menace. Mr. Tilghman states that the court seemed *very anxious* that the counsel should proceed, gave them full liberty to combat judge Chase's opinion before the jury and that they were not to be bound by that opinion. Judge Chase mentioned that cases at common law before the

Digitized by Google

stat. of Edw. III. *ought* not to be read. So of certain other cases; he particularly mentioned the case of the man who wished the stag's horns in the king's belly; and also of the man who kept a tavern with a sign of the crown, who said he would make his son heir to the crown. The judge declared such cases must not be cited; and said in illustration of his idea—What! cases from Rome, from Turkey and from France? That the counsel should go into the law, but must not cite cases that were not law. After these observations and in direct connection and reference to them, the judge said something about "*their proceeding agreeably their own consciences.*" What now begins to be the complexion and character of this part of the judge's behaviour? Why, that after giving these gentlemen the utmost latitude of discussion they could possibly require, he states a certain class of decisions and cases, which appeared to him and must appear to every body to be unworthy of notice—to be of no sort of authority or application in the case of Fries, which were not law; which Mr. Lewis himself has described as the offspring of corrupt and dependent and bloody judges, and which, if they had any operation, were hostile to the prisoner: I say, sir, after alluding to such cases, which he knew too had been used on the former trial, was it criminal or strange, he should make an appeal to the consciences, or characters, take it either way, before they proceeded to their defence.

A further examination of testimony, puts this part of the case beyond doubt. Mr. Rawle, after stating the same course of observations from the judge, as has been mentioned by Mr. Tilghman, and that he said, "I have always conducted myself with candour, and I meant to save you trouble." After relating to you how fully the respondent re-

Digitized by Google

moved every obstacle which had arisen from the proceeding of the first day, and how honorably he explained and justified the motives of his conduct, declared himself thus to the counsel: "having thus explained the meaning of the court, you will stand acquitted or condemned to your own consciences,"—the same terms used by Mr. Tilghman,—"as you think proper to act. Do as you please." This honorable court will be pleased to recollect that Mr. Rawle speaks not from the imperfect impressions of memory after the lapse of five years; but from full notes taken at the very moment of the transaction. It is needful to go further in justification of this mistaken menace. What says Mr. Ewing? "That the respondent told the counsel that if they read cases which were not law, after knowing the opinion of the court that they were not so, they would do it with a view to their own reputations." Mr. Meredith, after reciting what the judge observed upon the cases at common law, testifies that the respondent informed the counsel of Fries, "they might manage the defence in such way as they thought proper, having regard to their own characters." I hope, sir, we have now obtained a just notion of the nature and intent of whatever was said by the judge at this period of the transaction; and as no witness considered it as a menace but Mr. Dallas, we may justly conclude he has mistaken it. Is not this the true interpretation of it, that the judge had determined to give these gentlemen the utmost latitude of discussion, both of the law and fact, to any extent they thought proper, referring them only to their own sense of propriety, to their own consciences, to their regard for their own characters, as to the manner in which they would use this unbounded liberty? The respondent confided in the character and conscience of these gentlemen for the

Digitized by Google

fair exercise of their professional duty, and for such a limitation of their privilege of speech, as would prevent any abuse of it to improper purposes, or to an unreasonable extent. Suffer me, sir, to make one further remark, in confirmation of my position. It grows out of the acknowledged circumstances of the case, and, if fairly deduced, is evidence of the highest description. It is agreed by all the witnesses that on the second day, the respondent manifested and expressed the utmost solicitude and anxiety for the counsel to proceed in the defence and that he took "great pains" to induce them to do so. It is not doubted that he was sincere in this. Is it probable or possible then, with these dispositions, and while he was endeavoring to persuade and to induce these gentlemen to return to the defence of their client, he would indulge himself in threats, in insults and menaces, which would necessarily confirm them in the abandonment of the cause, and defeat the acknowledged wish the judge had that they should return to it? But still we are told, and this first article of impeachment concludes with averring, that in consequence of the conduct of the respondent, Fries was deprived of his right of being heard and defended by his counsel. To refute this unfounded assertion, we need go no further than to the testimony of Messrs. Lewis and Dallas. They surely are the best judges of the motives of their own conduct. What reason do they give for denying Fries their aid and advising him to refuse all other counsel? Because they had no hopes of success on a trial; because they believed the court had got into a difficulty where they were determined to keep them; because they thought they had a better chance to save their client's life by the uses they might make of the novelty of the first day's proceeding, than they could have on a full trial after this novelty was removed;

Digitized by Google

the counsel in short, withdrew from the defence of Fries, because they thought it would best serve him, *and were not influenced by any other motive whatever.* How does this testimony support the averment in the conclusion of the article, which boldly affirms, not that John Fries was saved, but that he was condemned to death, in consequence of not being heard by his counsel ?

A very strange and unexpected effort has been made, sir, to raise a prejudice against the respondent on this occasion, by exciting or rather forcing a sympathy for John Fries. We have heard him most pathetically described as the ignorant, the friendless, the innocent John Fries. The ignorant John Fries ! Is this the man who undertook to decide that a law which had passed the wisdom of the Congress of the United States, was impolitic and unconstitutional ; and who stood so confident of this opinion, as to maintain it at the point of the bayonet ? He will not thank the gentleman for this compliment, or accept the plea of ignorance as an apology for his crimes. The friendless John Fries ! Is this the man who was able to draw round himself a band of bold and determined adherents, resolved to defend him and his vile doctrines at the risque of their own lives, and of the lives of all who should dare to oppose ? Is this the John Fries who had power and friends enough, actually to suspend, for a considerable time, the authority of the United States over a large district of country, to prevent the execution of the laws, and to command and compel the officers appointed to execute the law to abandon the duties of their appointment, and lay the authority of the government at the feet of this *friendless usurper ?* The innocent John Fries ! Is this the man, against whom a most respectable grand jury of Pennsylvania, in 1799, found a bill of indictment for high

Digitized by Google

treason; and who was afterwards convicted by another jury, equally impartial and respectable, with the approbation and under the direction of a judge, whose humanity and conduct on that very occasion have received the most unqualified praise of the honorable manager who thus sympathizes with Fries? Is this the John Fries, against whom a second grand jury, in 1800, found another bill for the same offence, founded on the same facts, and who was again convicted by a just and conscientious petit jury? Is this *innocent* German, the man who, in pursuance of a wicked opposition to the power and laws of the United States and a mad confidence in his ability to maintain that opposition, rescued the prisoners duly arrested by the officers of the government and placed those very officers under duress; who with arms in his hands and menace on his tongue, arrayed himself in military order and strength, put to hazard the safety and peace of the country, and threatened us with all the desolation, bloodshed, and horror of a civil war; who at the moment of his desperate attack, cried out to his infatuated followers, "come on! I shall probably fall on the first fire, then strike, stab and kill all you can?" In the fervid imagination of the honorable manager, the widows and orphans of this man, even before he is dead, are made in hypothesis, to cry at the judgment seat of God, against the respondent; and his blood, though not a drop of it has been spilt, is seen to stain the pure ermine of justice. I confess, sir, as a Pennsylvanian, whose native state has been disgraced with two rebellions in the short period of four years, my ear was strangely struck to hear the leader of one of them, addressed with such friendly tenderness, and honored with such flattering sympathy by the honorable manager.

Digitized by Google

It is not unusual, sir, in public prosecutions for the accused to appeal to his general life and conduct in refutation of the charges. How proudly may the respondent make this appeal. He is charged with a violent attempt to violate the laws and constitution of his country, and to destroy the best liberty of his fellow citizens. Look, sir, to his past life, to the constant course of his opinions and conduct, and the improbability of the charge is manifest. Look to the days of doubt and danger; look to that glorious struggle so long and so doubtfully maintained for that independence we now enjoy, for those rights of self government you now exercise, and do you not see the respondent among the boldest of the bold, never sinking in hope or in exertion, aiding by his talents and encouraging by his spirit; in short, putting his property and his life in issue on the contest, and making the loss of both certain, by the active part he assumed, should his country fail of success. And does this man, who thus gave all his possessions, all his energies, all his hopes to his country and to the liberties of this American people, now employ the small and feeble remnant of his days, without interest or object, to pull down and destroy that very fabric of freedom, that very government and those very rights, he so labored to establish? It is not credible; it cannot be credited, but on proof infinitely stronger than any thing that has been offered to this honorable court on this occasion. Indiscretions may have been hunted out by the perseverance of persecution; but I trust most confidently that the just, impartial, and dignified sentence of this court, will completely establish to our country and to the world, that the respondent has fully and honorably justified himself against the charges now exhibited against him;

Digitized by Google

and has discharged his official duties, not only with the talents that are conceded to him, but with an integrity infinitely more dear to him.

FRIDAY, FEBRUARY 22, 1805.

Mr. KEY.

Mr. PRESIDENT,

I RISE to make some observations on the second, third and fourth articles of the impeachment. I shall not apologise for the manner in which I shall discharge a duty which I have voluntarily undertaken, but merely regret that indisposition has prevented my giving the subject that attention which it merits. It will be at once perceived, that these articles relate to the trial of Callender. Before, however, I go into an examination of the second article, it may be proper to notice the situation in which the judge found himself and the state of the public mind at the time. The sedition law was passed in the year 1799. It immediately arrested the public attention, and strongly agitated the public feelings. In the state of Virginia it was peculiarly obnoxious; many of the most respectable characters considered it as unconstitutional, and as a violation of the liberty of the press; most deemed it impolitic; while some viewed it as a salutary restraint on the licentiousness of the press, more calculated to preserve than to destroy it. In this state of the public mind, it became the duty of the respondent, in the ordinary assignment of judicial districts, to go into the district of Virginia, where he was entirely a stranger, to carry the laws into execution. It is scarcely necessary to observe that when laws are considered

Digitized by Google

obnoxious, much of the odium attending them inevitably falls on those who carry them into effect. In May, 1800, Judge Chase went to Richmond to hold a court; and soon after it was in session, the grand jury found a presentment and afterwards a bill against James T. Callender for an infraction of this law, in publishing the book entitled the Prospect before us, which brought into issue its constitutionality. Professional men of talents, carried along by the tide of public opinion, volunteered their services in defence of the accused; and every effort was exhausted to wrest the decision from the respondent. Exceptions were accordingly taken at every stage of the case, and when the jurors were brought to the book, a question arose which forms the foundation of the charge contained in the second article. I will in the first place read the article; then state the law and the fact in the case referred to; and shew that if both are against us, still the respondent is not guilty of the charge contained in it.

The second article states "That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress, and procure the conviction of the said Callender, did over-rule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind, as to the publication from which the words, charged to be libellous, in the indictment, were extracted; and the said Basset was accordingly sworn and did serve on the said

Digitized by Google

jury, by whose verdict the prisoner was subsequently convicted."

If we extract from this article the epithets it contains nothing will remain; and epithets fortunately do not constitute crimes. The offence and fact charged is, the permitting Mr. Basset to be sworn on the jury with an intention to oppress the traverser, which is not in the least supported by the testimony. The article alleges that Mr. Basset wished to be excused. I appeal to the testitimony, whether he did wish or desire to be excused—The observations he made arose entirely from a scruple on his own mind, and not from any objection to serving. Instead of his wishing to be excused, the real fact is that what he said flowed from the peculiar situation in which he stood; and he says that he declared himself willing to serve, provided in law he was competent. The fact, therefore, on which this article rests, is not supported by the testimony, and not being supported, I might here dismiss this branch of the subject without further animadversion. But I cannot, consistently with my duty, stop here, or omit proceeding to shew that the arguments of the honorable managers are as unfounded in law as their facts are destitute of proof. Let us then examine the law on this case. To sustain the article, the honorable managers must prove three points.

1. That Mr. Basset objected to serving.

2. That in point of law he ought not to have been admitted on the jury; and

3. That his objections to serving were overruled from a corrupt intention on the part of the respondent to oppress and procure the conviction of the traverser.

It is necessary here to examine the ancient doctrine of challenges. The law of challenges presents itself to our view in a twofold character, the

Digitized by Google

one a challenge to the array, which goes to vitiate the whole jury; the other an objection to a particular juror. In this case there was no serious challenge made to the array. My observations will therefore be directed to the latter species of challenge, that of individual jurors, which is made by excepting to an individual when he is presented to be sworn. In this case no such exception was made to Mr. Basset.

When a juror is challenged, there are two modes of trying whether he stands indifferent. One mode is by two triors consisting of the two jurors first sworn. Callender's counsel did not avail themselves of this mode.

The other mode is to swear the individual offered as a juror, and interrogate him as to his indifference.

Here I cannot avoid expressing my surprize at the law laid down by the honorable managers. No point of law is more certain than that a juror to be indifferent, need not have refrained from having expressed an opinion either upon the law or the fact involved in the case he is to try; and that he is only rendered incapable by favor or malice.

The great principle which the counsel laid down was that jurors should be impartial; but is that the subject of investigation in this article; what are the facts? That judge Chase put this question to the juror, "have you formed and delivered an opinion on the charges contained in the indictment?" The juror answered in the negative and was sworn. Gentlemen say the question should not have been formed *and* delivered, but formed *or* delivered; and that this was the question on the trial of Fries. I mean to shew that there is no difference between the two expressions. I mean to shew that if the juror had both formed and delivered an opinion, this would not incapacitate him.

Digitized by Google

The oath of triors will bring this case to a precise point. Trials per pais 179, Salkeld 144, states the oath of a trior to be, " you shall well and truly try, whether A (the juror challenged) stands indifferent between the parties to this issue."

But the counsel were not willing to determine the competency of a juror by this oath ; and therefore gave the decision to the court. They contend, however, that the indictment ought to have been read. But though on the facts the juror may have made up his mind, the offence consisted in the intention, and therefore the forming an opinion on the former did not imply a judgement on the latter. Is there a man that does not believe that when one person kills another with malice prepence, he perpetrates murder ? Is not the intention the git of the offence ? And, yet I can produce authorities to shew that although a juror in a criminal case give a verdict on the fact and the law, this is considered as no objection to his serving as juror in similar cases.

In Rolles abridgement, title trial, folio 657, it is laid down that " if a juror has said that he will find for one of the parties, it is a good cause of challenge for favor, if he so spoke from favor; but if he did not speak it out of favor, but from his knowledge of the matter in issue, it is not a good cause of challenge."

In the same folio, it is also laid down as law, " that it is no cause of challenge to a juror, that he hath said, that he will find his verdict for one of the parties, if it is not found by the triors or the court, that he spoke from favor, and not from the truth of the fact."

In folio 655, and in trials Per pais, it is laid down, " that if a juror hath twenty times declared that he will find for one of the parties, it is not a principal challenge, because he might have spoken

Digitized by Google

it from his knowledge of the matter in issue, and not out of favor or malice."

In Keelynge, folio 9, we find a case where a juror had formed a verdict of guilty against a person, and another person was tried on the *same* indictment for the same offence; in which an objection on that account to the juror was over-ruled.

The objection in this case was over-ruled—why? because the juror stood indifferent. Could then any answer of Basset to the question propounded to him evince any degree of partiality, or that his mind was not in a state of indifference as to the issue of the trial? Having formed an opinion that a particular writing constituted a libel, did not preclude him from forming an upright opinion on the law and the fact. How had Basset formed an opinion? Simply from seeing certain passages, in a newspaper, which purported to be taken from the Prospect Before Us. Did he not then stand impartial so far as respected the ascertaining whether those passages were authentic, whether Callender was the author?—if edited with intent to defame: Further, was there not another decision to be made, whether the matter was false and malicious? The essence of the offence consisted in the intention. On all these points the mind of Basset was perfectly free from partiality.

To the authorities I have cited I will add one derived from our country, in which all the doctrines I have contended for are expressly recognised in the decision of chief justice Ellsworth in the state of Connecticut, to be found in Kirby's reports, page 427;—"As to the other point; an opinion formed and declared upon a general principle of law does not disqualify a juror to sit on a case, where that principle applies. Jurors are judges of the law as well as of the fact, as relative to the issues put to them, and are supposed

Digitized by Google

to have opinions of what the law is, though a willingness to change them, if reason appears in the course of the trial. They may all be challenged on one side or the other, if having an opinion of the law in the case is ground of challenge. It is enough in point of indifferency, that jurors have no interest of their own affected, and no personal bias or prepossession, in favor or against either party, and not requisite that they should be ignorant of the cause, or unopinionated as to the rules and principles on which it is to be decided. It has been adjudged (23 Can. K. B.) not to be a sufficient cause of challenge, that a juror had declared his opinion concerning the title of the land in question; so also that the jury have found others guilty on the same indictment; or that a juror has declared his opinion that the party is guilty, and will be hanged, if it appears he made such declaration from his knowledge of the cause, and not out of ill will to the party. 2 Hawk. P. C. 418."

I trust the authorities I have adduced fully shew, that in point of law there was no valid objection to Mr. Basset as a juror, and that the illegality charged against Judge Chase on this account falls to the ground.

I will now turn to an authority cited by one of the honorable managers—3rd Bacon—756—[Mr. Key here read the case.]

We find that all the causes of challenge here recited go to evince partiality, or in the language of the ancient books, "favor or malice." If the having formed and delivered an opinion on the law were a good cause for challenge, no capital case could come before an unprejudiced jury. The only question in such cases is whether the facts proved come up to the charge. For such is the interest men take in the commission of great crimes that every man forms an opinion on them.

Digitized by Google

Something has been said of the trial of Logwood for forging the currency of the bank of the United States. There is probably no man of information that has not heard something of the subject, or made up his opinion on the illegality of counterfeiting. But does it follow that the having formed such an opinion could disqualify a man from serving as a juror in the case? If this were so, it would follow that he who had formed the most correct opinion on the laws of his country would be the most incompetent, while he who was the most ignorant of them, would be the most competent juror. It appears that if Mr. Basset had even answered in the affirmative to the question put to him, supposing the indictment to have been previously published, it would not have destroyed his competency as a juror, because he, notwithstanding, stood perfectly impartial as to the facts to be proved and the law arising on them.

Believing that no subtility or ingenuity can shake the principle I have laid down, or establish a contrary principle, I feel full confidence in having shewn the legality of the opinion laid down by the court; and I do believe that a more correct opinion was never delivered.

Suppose we are mistaken in the fact, which we say is proved, that Mr. Basset did not desire to be excused; admit that he did pray to be excused, still so far as he has himself on oath explained the situation of his mind, there was no cause for challenge.

Admit also that we are mistaken in the law we have laid down, does it follow as a necessary consequence that the directing Basset to be sworn on the jury was done with an intent to oppress the traverser? We call for the facts that impeach the motives of Judge Chase. In the opening of this case we were told that the respondent was highly

Digitized by Google

gifted with rich attainments of mind. It was correctly said; and it might have been added that his integrity was equal to his talents. But the observation was made to raise his head at the expense of his heart. I will examine this argument.

The truth is that no judge is liable for an error of judgment. I apprehend this is conceded by the article itself, which states a criminal intent. Now for the evidence. What criminal intention do the honorable managers draw from it? It is said that the respondent is highly gifted with intellectual powers, and must have known in this instance the law. *Timeo Danaos et dona ferentes.* I dislike the compliment; the best gifted mortals are frail, and a single erroneous decision may be made by any man.

Let us, on this point, refer to decisions in modern times. They will shew that an error in judgment has never of itself been considered an evidence of corruption in a judge.

Mr. Key here cited a case from Dunford and East, folio 653—King *vs* Johnson, containing the opinion of justice Buller, who declares "that you can never infer corruption from the judgment itself but from the opinion given."

Here then is the decided opinion of a most able judge that although the act and judgment of the court be illegal, there is no ground to infer corruption. So in this case, admit, for argument's sake, that we are mistaken in point of fact, and that the law we have laid down is incorrect; still, however gross the error of the judge, it cannot in itself contain any foundation for presuming fraud. From what fact is fraud inferred? From the general mass of the transactions attending the trial of Callender? The evidence cannot be taken accumulatively. Each article must be taken by itself, and one can derive no force from the rest. Were this

Digitized by Google

not the case, a hasty word, uttered in an unguarded moment, might be construed into a crime, and a number of small offences, individually of the most trifling nature, be made to constitute a great one.

I shall, in a subsequent view, take into consideration the whole conduct of judge Chase, and shew that, so far from operating to his injury, it redounds to his credit. Upon this second article, I trust I may be permitted to say that the evidence does not bear out the facts in the manner stated; that even if the alleged facts are proven, the law is clear that Mr. Basset was still a competent juror. I have also endeavoured to shew that no inference of corruption can be drawn from an error in law; but that, on the contrary, particularly if it be committed by a man of acknowledged talents and unimpeached integrity, it is to be considered at best but as a mistake.

It would be well to analyze this argument of the honorable managers, by putting it in the form of a syllogism. The major proposition represents judge Chase as possessed of great legal attainments and as highly gifted by nature; this I admit—the minor is that with these high gifts and attainments he has erred in a clear point of law; this I deny—But what is the conclusion deducible from the premises? That his decision was corrupt? So say the managers. I deny it. In the language of the judge it is a palpable *non sequitur*.

I will now proceed to the third article, which, when correctly understood, will be found as destitute of impeachable matter as either of the other articles. It is as follows:

"That, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the afore-

Digitized by Google

said Callender, was not permitted by the said Samuel Chase to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact."

In opening the case one of the honorable managers enquired what human subtility or ingenuity could devise to extenuate this act of the respondent. Our reply is that it requires no subtility or ingenuity; that it was correct in point of law, and that the case is so clear, that he who runs may read. The court must permit me to observe that the article presents an abstract case, not growing out of, or connected with the evidence. This court, I apprehend, is not sitting here to decide this abstract point, whether in any case it is admissible to prove one fact contained in a particular charge by one witness, and one by another; but to determine whether in this case, where one witness was offered to prove part of one charge, and no other witness offered to the same charge, it was proper to receive the testimony offered. I contend that the decision was correct on the case before the court. The indictment against Callender contained two counts, each of which embraced twenty distinct set of words. Col. Taylor was called to prove particular facts contained in one of the charges. It is not necessary here to discuss the propriety of ordering the questions to be reduced to writing, as that is the subject of the next article. Col. Taylor, without meaning any improper use of words, was a witness on speculation; for no man has a higher respect for his character; but I bottom the remark on this circumstance, that several days previous to Col. Taylor's appearance, an affidavit had been drawn, on the part of Callender, for a continuance, in which the names of a

Digitized by Google

number of material witnesses were stated; among which was an honorable member of this court (Mr. Giles) and general Mason, but in which the name of Col. Taylor does not appear. It appears that subpœnas had issued for three witnesses; two of which did not attend, for whom no attachment was prayed. Col. Taylor alone appeared; and the counsel were certainly ignorant at the time he was sworn, what he could prove. Mr. Hay has declared that neither Callender or his counsel knew what col. Taylor could prove. Was it not correct in the court, under these circumstances, to ask what he could prove? Col. Taylor was produced, under an expectation, it is said, that he could prove the twelfth set of words contained in the second count of the indictment. Let us, to elucidate the conduct of the court, refer to the testimony of Mr. Robertson, a man distinguished for his stenographical talent, which remains on paper, which was drawn up at the time, and does not therefore depend on the frailty of his memory.

Mr. Robertson says, "The attorney for the United States having concluded, the counsel for the traverser introduced Col. Taylor as a witness, and he was sworn; but at the moment the oath was administered, the judge called on them, and desired to know what they intended to prove by the witness. They answered, that they intended to examine Col. Taylor, to prove that Mr. Adams had avowed principles in his presence which justified Mr. Callender in saying that the President was an aristocrat—that he had voted against the sequestration law, and the resolutions concerning the suspension of commercial intercourse with Great Britain." This was then the object and view with which Col. Taylor was called on. What is the charge in the articles of impeachment? That the

Digitized by Google

testimony of Col. Taylor was rejected "on pretence that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact."—The charge in the indictment is that the President "was a professed aristocrat; that he proved faithful and serviceable to the British interest:" and Col. Taylor was called to prove that Mr. Adams had voted against the sequestration law, and the resolutions concerning the suspension of commercial intercourse with Great Britain.—Was it competent to Col. Taylor to give evidence on this point? The best evidence the nature of the case will admit must be adduced. Col. Taylor then was clearly an incompetent witness on this point; as there was better evidence, the journals of this honorable body, within the reach of the traverser. It only then remained for Col. Taylor to prove that the President had avowed principles which shewed him to be an aristocrat; which, if proved, would have been altogether immaterial. To prove no other facts was he called upon. Are then counsel to be indulged in consuming the time of courts in the examination of witnesses, who have nothing relevant to offer? Let us familiarise this to a common case. Suppose a man is indicted for stealing a horse. One witness deposes that he saw him go into the stable where the horse was; another saw a man coming from the stable leading a horse; and another saw, an hour after, the man, with the horse, five miles off, selling him as his own property. This testimony will be admitted? But state the case the other way; that a witness was brought forward solely to prove the first fact; is there a court on earth that would say such testimony should be admitted? And this was the case here. Col. Taylor was called upon to prove what is altogether unim-

Digitized by Google

portant, a part only of one charge; or that which, if true, could be proved by better evidence. Are not, also, the court the exclusive judges of the competency of the testimony that shall go to the jury; and does not every day's experience shew us that evidence that is offered, but which does not go to the whole of the case, is refused? This is done by all courts at all times. But say gentlemen, was it possible for the court to know whether the questions offered to be put might not have led to other enquiries, and produced information of consequence? True, but on this ground no testimony ever could be rejected, because by possibility, it may lead to what is important.

But, admitting the judge to have been wrong, I again ask, does an error of judgment in itself imply corruption? Most surely not. In the nature of things can it be so? To give credit to my honorable client but for a moiety of the talent allowed him, he must have seen that, even had he admitted the testimony of Col. Taylor, and admitting that it had justified the whole of the twelfth charge, there remained nineteen other charges, on which Callender must have been convicted. And whence this conduct towards Col. Taylor? Did not the judge know that Col. Taylor stood high in the esteem of a large portion of the community; and that umbrage offered to him would naturally excite the indignation of his friends? The decision given could not then flow from a corrupt motive. No. It was given in the sternness of his integrity. Had his motives been impure, had he viewed his conduct as wrong, instead of acting in this manly way, he would have put a gloss on his actions, he would have courted the reputation of forbearance by admitting the testimony of Col. Taylor, and would still have satiated his vengeful feelings, if he had them, with a conviction on the remaining charges.

Digitized by Google

Let us examine another fact in this case. Judge Chase, as appears by the statement of Mr. Robertson, requested the attorney of the United States to permit the questions to be put to the witness; but Mr. Nelson "declared that he did not feel himself at liberty to consent to such a departure from legal principles." If then, in this act, there was error, that error did not depend on him. The prosecutor for the United States objected to the indulgence which he proposed. I do for myself believe, that where no evidence is offered to prove the whole of one entire fact, it is within the sound discretion of the court to refuse the testimony of part—But, notwithstanding this, the judge was willing to relax the severity of the law.

Is there nothing else that goes to shew that there was no intention on the part of the judge to oppress the traverser? As I have already observed, if he had possessed but half the talent ascribed to him, he would, with such intention, have gilded the pill. But he did not do so. Further, the subsequent act of the judge in imposing so light a fine, and so short a period of imprisonment, for so atrocious an offence, when he had power to impose a fine of 2000 dollars, and an imprisonment for two years, is indisputable evidence of his freedom from all such intention. No; the conviction flowed of necessity from the evidence, which was too powerful to be resisted. But did not the judge, in the integrity of his heart, declare, on rejecting the testimony of Col. Taylor, gentlemen, "I may be mistaken, but if I am not right, it is an error in judgment, and you can state the proceedings on record, so as to shew my error, and I shall be the first man to grant you the benefit of a new trial by granting you a writ of error, in the supreme court."

Digitized by Google

It is said, however, that this was a mere pretext; that a bill of exceptions would not lie in a criminal case; and what could then be done? The simplest thing on earth—a point of law can be saved without an exception. The counsel were not so ignorant as not to have respected this declaration, and to have known that they might, under it, have saved the point, and taken the opinion of the superior court. The least informed counsel can shew a multitude of cases of this kind. In the progress of my argument I shall shew why this offer was not accepted.

It does then appear to me, that, considering the third article as connected with the facts substantiated, the judge was perfectly correct in point of law in the decision he made. All must agree in the opinion that if the testimony of Col. Taylor had proved Mr. Adams an aristocrat, it could not have justified the libellous matter with which the traverser was charged. If this is the fact, and no other evidence was offered that could be legally received, the rejection must have been perfectly correct. Supposing, however, that we are wrong on this point, there is still abundant evidence to shew that Judge Chase was not influenced by any intention to oppress the accused, or to procure his conviction, because that unavoidably flowed from the nature of the charges and the state of the defence, whether the testimony of Col. Taylor were admitted or not.

In the course of my whole observation through life, I never heard it doubted till yesterday, that in a case of doubtful aspect, a man is to be considered innocent until he is proved to be guilty. But we are now told that whenever an infraction of a law is committed by a judge, he is to be presumed guilty, unless he establishes his innocence. But this is not the case, the benignity of our law is very

Digitized by Google

different.—If it were so, who, that possesses the ordinary frailties of humanity, would undertake in the judicial station to interpose between man and man. The law clearly is that a judge shall be presumed innocent until he is proved guilty, even when he decides against law; and that his errors shall be ascribed to the head, and not to the heart. This notice is due to the observation of an honorable manager, which struck me with great surprise, that Mr. Basset's request to be excused from serving as a juror arose from his sentiments being known by the judge. This, however, does not appear from the evidence. It appears, on the contrary, that he was a stranger to judge Chase, and that he did not wish to be excused. But in this prosecution we are not only to hear much new and extraordinary doctrine; but we are likewise to hear statements of facts for which there is no foundation.

I will now proceed to the fourth article, which contains five distinct specifications of facts as follows:

"That the conduct of the said Samuel Chase, was marked, during the whole course of the said trial, by manifest injustice, partiality and intemperance; viz.

"1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission, or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness:

"2. In refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term:

Digitized by Google

"3. In the use of unusual, rude, and contemptuous expressions towards the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend:

"4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which, at length, induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment:

"5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice."

The word *injustice* in the preliminary part of the article must refer to Callender; the *partiality* charged must have been to the United States, I presume, and against Callender; the term *intemperance* is of such doubtful import, that I scarcely knew what to understand by it: It cannot be used as opposed to sobriety, as no one will charge the judge with a violation of this virtue. It may refer to his conduct to counsel, and perhaps to Callender. This conduct is said to have been evinced, in the first place, "In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission, or rejection, all questions which the said counsel meant to propound, to the above named John Taylor, the witness."

If this was incorrect, I cannot perceive its injustice to Callender, nor its partiality or intemperance. But did the conduct of the court in this instance, correspond with the law and the practice? I apprehend that it did. I understand it to be a

Digitized by Google

clear and admitted principle of law, that the court is the only competent tribunal to determine the competency, the admissibility, and the relevancy of evidence; when admitted, its credibility is the exclusive province of the jury. I have before stated the reasons which rendered it necessary in this case to know what col. Taylor could prove. To understand the object for which he was produced with greater certainty and precision, the judge ordered the questions, proposed to be put, to be previously reduced to writing. I am not sufficiently acquainted with the practice in the courts of Virginia to say this was not novel, but I may surely venture to affirm that there was nothing criminal in it. I know well that in different states there are different forms of practice. I can only say, that judge Chase, going from Maryland, where the practice does prevail, would naturally carry to Virginia the knowledge of the practice of the state from which he went. It is said that it is not the practice in Virginia, and one gentleman says he never heard of an instance of the kind. But I believe there are exceptions. I recollect, in the *mandamus* case, the counsel were called upon to reduce their questions to writing, and that the attorney general had a whole day allowed him to make up his mind on the propriety of answering the questions put to him. And yet in that case there was no disposition manifested to oppress; the course was pursued, to determine the competency and relevancy of evidence. Need I go further than the practice of this honorable court in this very case, in which there have been numerous instances of questions directed by the court to be reduced to writing. Have not you, Mr. President, from a knowledge derived from your extensive practice of the bar, or from an instantaneous exercise of right reason, in several instances, direct-

Digitized by Google

ed questions to be reduced to writing? And has it not been seen that though counsel withdrew their objection, every member of the court possessed and exercised the right of requiring it to be done? No testimony, which is not legal, should be admitted to go to the jury, and what is legal testimony, and the manner of determining it, must be decided by the court.

We have thus made it to appear that it is the practice to direct questions to be committed to writing in the courts of Maryland, in the supreme court of the United States, and in this court.—Does not this abundantly justify the conduct of the respondent? But even admitting that conduct to have been improper, was it corrupt or criminal? What moral obligation did it violate? What statutory provision did it infringe? And is a man impeachable for that which violates no moral principle or legal provision? If so, this is the most dangerous doctrine ever advanced.

The *second* specification is in the following words:

"In refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that with the utmost diligence, the attendance of such witnesses could not have been procured, at that term."

This charge is grounded on the fact of a refusal to postpone the trial on an affidavit. That the court acted correctly in this instance will appear from this consideration. Nothing is more clear than that under the common law, all applications for a continuance, on affidavit, are founded on the discretion of the court. Is it not wonderfully singular that there should have been an application founded on an affidavit, if the law of Virginia, as stated in the 6th article, applied to the case? One

Digitized by Google

thing is clear; either that the Attorney General and Mr. Hay had lost all recollection of the existence of this law of Virginia respecting continuances, or that they considered it inapplicable. For they would not otherwise have founded the application on an affidavit. They would have produced the law and have demanded a continuance. Did they do so? No. If then the law officer of the state and Mr. Hay both forgot that it existed, is it surprising that it should be unknown to Mr. Chase? If those gentlemen did recollect the existence of the law, they must surely have been of opinion that it did not apply to the case of Callender, or they would have saved themselves the trouble of filing an affidavit. It will however be shewn that it did not apply, and hence their application founded on affidavit.

I have stated that all applications for a continuance on affidavit are addressed to the discretion of the court. It is a great object of criminal justice that the punishment of the guilty should be certain, lenient and speedy. In the state of Maryland, where Judge Chase had so long presided or practised, it is the uniform practice to try offences the first term they are presented; it is also the practice in England unless particular reasons are assigned for delay. I was about to prove this; but as it is conceded I will not trouble the court with authorities. Judge Chase then, having no knowledge of the particular law of Virginia, had to recur to the affidavit. Was that a cause for the continuance of the trial? When a man is charged with a criminal offence, matter, which shall justify a continuance, must go to the whole of the charges, and not merely to a part of them. If he cannot defend some of the charges, he is to plead guilty to them, and pray a continuance of such of the charges as he can justify by evidence. This is an universal rule of justice

Digitized by Google

and of practice. To familiarize it by a common incident. A man is indicted for stealing a horse, a saddle, and a bridle. He is arraigned, and pleads not guilty, and then desires a continuance, on an affidavit that an absent witness can prove that the bridle is his own. Would it not revolt common sense to continue the case, when his defence rested on such grounds? No court of criminal jurisprudence would prostitute justice by conniving at such an indulgence.

How was it in the case of Callender? Were there not, in each count of the indictment, twenty distinct sets of libellous words? In order then to warrant a continuance, it was necessary to shew the absence of material witnesses in relation to the whole, or to plead guilty to all the charges on which such testimony did not exist.

But it is said the Judge had no right to be informed what, it was expected, could be proved on behalf of the traverser. This idea is novel to my practice. I will not say it does not prevail elsewhere; but certain I am that it does not prevail in the courts which I have attended—It is again alleged that a party is not obliged to disclose his testimony. But the law provides that he shall, when he applies for a favor. So different is the practice in the state of Maryland from that contended for on this occasion, that a party is obliged to state what he expects to prove, and if the opposite party admits it, they must go to trial on the remaining part of the charge. According to the practice of Maryland this affidavit is materially defective, inasmuch as not guilty is pleaded to the whole of the charges contained in the indictment, and it is not declared that testimony is wanting, which there is a reasonable expectation of getting, to disprove or justify the whole of them. It is also materially defective in another point. It is not stated that there

Digitized by Google

was a probability of obtaining the testimony within a reasonable time. I have never known an affidavit considered good, which did not state this circumstance.

We allow that every man is intitled to compulsory process to obtain the attendance of his witnesses; but this right does not in the least lessen the discretion of the court, with regard to the time on which the trial shall take place; this they will fix according to circumstances; and when the trial does come on, should the witnesses summoned by a party not attend, he is intitled to attachments against them. This affidavit then was defective in two respects; it did not state the absence of witnesses who could justify the whole of the charges; neither did it state an expectation that they could be had within a reasonable time. If a man undertakes to libel the government under which he lives, to hold it up to the resentment and scorn of the people, it is but reasonable that he should be prepared at the time of his publication with a justification of his charges. In this instance, it appears that a large part of the contemplated justification rested on records, and that even these had not been procured.

The honorable managers have observed, that even in England the courts will grant time to enable the party accused to issue process for his witnesses. Let me however, surmise that although subpœnas had been served on Mr. Giles and Mr. Mason, no process of attachment issued on their non-appearance. The Judge intimated that it might issue; but the counsel waved accepting it. From what cause? Because they well knew that the testimony of these witnesses would be of no avail.

An authority has been cited from the English books, [Foster's reports] to shew that at a special court, time was granted for obtaining witnesses alledged to be material; although, as it has been

Digitized by Google

remarked, the court was confined to one term; but I cannot perceive the force of this observation, as it had the power of adjourning from time to time until the business before it was finished. The court met, saw the extent of the business to be attended to, and allowed time for the obtention of witnesses.

[Mr. Key here cited the case from Foster's crown law.]

In this case the prisoner was tried at a great distance from his witnesses, and the place where the crime had been committed. Some of his witnesses resided in England, and others in Scotland. He was allowed eleven days for obtaining his witnesses in England, and twenty one days for obtaining those in Scotland.

Compare this case with that of Callender. In the latter case a motion was made for a continuance. The judge declared they could not postpone the trial to the next term; but offered a postponement for a month, or six weeks; nay, he offered to go to Delaware, hold a court there, and return to Richmond. With such a disposition manifested by the court, is there any reason to doubt, that, if asked, three months, or any reasonable time would have been allowed. And why did they not ask for a longer time, if they deemed it important? The answer is obvious—Judge Chase was still to preside.

Doubts have been started of the power of the courts of the United States to adjourn except from day to day; a power which I never before have heard questioned; and which is essentially necessary to the impartial administration of justice. We have proved that this is the practice of the courts in Maryland and Pennsylvania, and that it has been done in Richmond; and I believe we may safely add that it is, and must be, the practice through-

Digitized by Google

but the United States, when circumstances demand it.

I have stated it as an acknowledged principle of law, that he who edits libellous matter ought to be prepared with his vouchers to support it. What is there valuable among men; what is there estimable in private or public life, that has not in this country been basely calumniated by the licentiousness of the press? All characters in all administrations have been most wantonly assailed by its scurrility. He then who takes this bold and daring ground, ought to have his vouchers at hand, or to have them within accessible reach. In the situation in which a libeller wantonly stands, he is entitled to nothing but law, sheer law.

On the third specification which charges the respondent with "the use of unusual, rude, and contemptuous expressions towards the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend;" I have but a few observations to make. I should indeed have spared many of the remarks I have made, were it not for an ignorance of the particular ground on which the honorable managers mean to rely in their reply—and were it not for the fear that an omission to notice any of the charges preferred, might be considered as an abandonment of our defence so far as related to them.

I have no where discovered in the evidence any thing that supports in point of fact the charge against Judge Chase, of falsely insinuating that the prisoner's counsel wished to excite the public fears and indignation and to produce insubordination to law. The Judge did say that the counsel used a popular argument, calculated to mislead and deceive the populace; and this is the extent and head

Digitized by Google

of his offending; but there is a wide difference between this and the charge laid to his door. He told the counsel, and told them truly, that they were availing themselves of a popular argument calculated to mislead and deceive the people. Attend, I pray you, to the testimony of Mr. Hay. Did not the counsel for the prisoner say they had no hope of exculpating him on the facts? Did they not say they did not argue for Callender? That it was the cause, and not the man, they defended? That they did not expect to convince Judge Chase, or any other federal Judge of the unconstitutionality of the sedition act? Were they not then laboring with their whole talents to catch the popular ear? Did they not expressly declare that they had little hopes of the jury, and that their object was to make an impression on the public mind? And when the Judge declared that the constitutionality of the act could not be discussed before the jury, did they not, failing in their object, abandon the defence? The ground which they meant to have taken was withdrawn, and they withdrew with it.

As to the use of unusual, rude, and contemptuous expressions towards the prisoner's counsel, no particular facts appear to be relied on. The term *captious* may be unusual; the phrase *young gentlemen*, which in the opening the honorable manager metamorphosed into *boys*, but which last word does not by the testimony appear to have been used, may have been obnoxious to the ears of those to whom it was applied. There may not have been manifested in this language the most refined decorum; but let us recollect that our honorable client is not now on his trial for a violation of the decorums of society. Possessed of great ardor of mind and quickness of feeling, he conceives with rapidity, and expresses with energy his ideas. This may be a weakness; but it is a weakness of nature.

Digitized by Google

Had he a colder heart, and weaker head, he might not be exposed to these little indiscretions. But where is the vade mecum from which a judge is to derive precedents for his behaviour? Courts are instituted, not to polish and refine, but to administer justice between man and man. One judge may possess a more pleasing urbanity of manners than another; but are we to infer that because a man is warm in the expression of his sentiments, he is therefore angry? It will not be contended that when the counsel for the traverser spoke of the necessity of the indictment being verbatim et literatim, the witty reply of the Judge that they might as well insist that it should be *punctuatim*, there was any violation of decorum manifested. The reply grew out of the occasion, and never was a remark better applied.

I know of no other unusual language, except the expression of *non sequitur*; and surely there was nothing improper in that. We have been told that it is the usual habit of judge Chase to interrupt counsel when they attempt to lay down as law that which is not law. In this case, he certainly did so; but it does not appear that he departed from his ordinary course; and if he had, where is the rule which, on such occasions, is to govern a judge? Such conduct, as I have before observed on another point, violates no moral obligation, infringes no statutory provision. The judge may not have displayed the urbanity, the suavity, and the patience, which so happily characterise some high characters; but where or when has the absence of these minor qualities been considered as criminal? Some of the witnesses, and among them Col. Taylor has described the conduct of the judge as imperious, sarcastic and witty; but no witness has pronounced it tyrannical or oppressive.

Digitized by Google

With regard to the 4th specification which relates to the interruption of counsel, I shall say but little. A judge has a right at all times to interrupt counsel whenever they act improperly. It is the inherent right of courts. When that is laid down as law which is not law, it is not only their right, but it is their duty, to stop them. Such interruptions may be considered vexatious by the counsel that are interrupted; but of such matters the court only can be the judge. One witness, examined on the frequency of the interruptions of counsel on the trial of Callender, has said that more interruptions occurred in a case before judge Iredell, whose eulogium has been pronounced by an honorable manager; and another witness has informed us that it is the habit of judge Chase frequently to interrupt counsel in civil as well as criminal cases; that the habit arises from the vigor of his mind, and the ardor of his feelings; that this is somewhat embarrassing to counsel, but that a little suavity on their part soon restores the judge to good humor. On this point I have no further observations to make. I will leave it to the good sense of this honorable body to determine how far the conduct of the respondent was, on this occasion, indecorous, and how far, on account of this conduct, he is liable to impeachment.

I have omitted to notice one of the interruptions, relied on by the managers. When the counsel for the traverser insisted that the jury had a right to assess the fine, according to one of the witnesses, the judge replied that it was a wild notion; according to Mr. Robertson, he said it was a mistaken idea. And that it was, every professional man will acknowledge. The point had been previously decided at Richmond by judge Paterson and judge Iredell; it had been decided that the law of Virginia did not apply, and that the assessment of

Digitized by Google

the fine was the province of the court. By the law of Virginia, a fine is assessed *ad libitum;* by the act of the United States it is provided that it shall not exceed a certain sum. How then was it possible to act under both laws?

As to the 5th specification, which is in these words:—" In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge as it was subversive of justice;"—I have no precise idea of the meaning of the term *indecent solicitude*—Solicitude means *mental* anxiety.—If we are to understand by solicitude that the judge felt anxiety for the furtherance of justice, that is simply an operation of the mind, and to determine whether it is praise-worthy or reprehensible, some overt act must be shewn. For is it possible that in any interesting case, a judge can sit on the bench without feeling some interest in the issue? This is more than falls to the lot of mortal. No, he must have feelings; and all that can be required is that he restrain them from breaking out into acts subversive of justice. I will endeavor on this point to condense the testimony. It is said that the solicitude of the respondent is evinced by his indecent behaviour to the counsel, and by his conduct previous to the trial. A jocular conversation is resorted to; and expressions made in the most unguarded moments are drawn forth in judgment against him. After he had delivered a charge at Annapolis, Mr. Mason came up to him, and asked him what kind of charge he had delivered, whether it was to be considered as legal, religious, moral, or political. To which the judge replied that it was a little of all. Some conversation ensued on the licentiousness of the press, and he observed that when he went to Richmond, if a respectable

Digitized by Google

jury could be found, he would have Callender punished. All this is worked up, as it were by magic, to prove a deliberate purpose on his part to institute a prosecution. That a man of the intelligence of judge Chase, had he conceived such a project, should have thus jocosely, as it is proved, and in public, have divulged it, is beyond all belief. Let not a casual conversation of this light and sportive kind be tortured into evidence of a deliberate design. No man, the least acquainted with the general character of judge Chase, will entertain the idea for a minute.

Another circumstance complained of, is that judge Chase was provided with a *scored* copy of the Prospect Before Us; and this is adduced to prove his purpose to oppress Callender. But we have given it in testimony that this copy was scored by Mr. Martin, who handed it to the judge, when he was about going to Richmond, to amuse him on the road, and to make such other use of it as he pleased. What was there improper or indecent in this? Further: the respondent is next hunted through a line of stages on his passage from Dumfries to Richmond; and Mr. Triplet is brought forward to prove that he expressed a wish that the damned rascal had been hanged. Had there been a settled purpose to convict or oppress Callender, would it not have been manifested by concealment and prudence, instead of being divulged by such an intemperate impulse of feeling.

We next find the respondent at Richmond. And here a gentleman states that having moved the court for an injunction, he went to the chambers of Judge Chase on the subject on the morning subsequent to the motion being made, and before the Judge had gone to court; that while he was there, Mr. David M. Randolph, the marshal, came in, and shewed the judge the panel of jurors for the

Digitized by Google

trial of Callender; that the judge asked him whether there were on it any of the creatures called democrats, and added, if there are, strike them off. Here must be some mistake. The witness must have heard some other person say so. Sure I am that the testimony will shew that the statement of Mr. Heath cannot be received as correct. I impute no criminal intention to the witness; this is not my habit; but for ascertaining the weight which it ought to have, I will collect and compare the several parts of the testimony on this point.

It appears that Mr. Heath was at the judge's chambers but once. Mr. Marshall, the clerk of the court, called on judge Chase the same morning that Mr. Heath was there—He cannot recollect whether Mr. Randolph went with him, according to his usual practise, but he is certain, from a conversation he states, that they walked together to court; he met Mr. Heath either in the act of coming out of the Judge's room, or exterior to the door; and he heard no such conversation as he relates. What says Mr. Randolph? That no such conversation ever did take place. Here then the testimony is directly opposed. But it is said that our testimony is negative, and is therefore outweighed by the positive testimony of Mr. Heath; this, however, is not the fact. Much of our testimony is positive. Mr. Randolph declares that he has never shewn the pannel of a jury to a judge, except in the case of a grand jury, offered to the court to select a foreman; and he is positive that the pannel in the case of Callender was not made out until the morning of the 3rd of July in court, when his deputies came forward with the names of the jurors they had summoned on small slips of paper; and in corroboration of this evidence, it appears, on the testimony of Mr. Basset, who was sworn on the jury, that he was not summoned until the third of

Digitized by Google

July; and that the marshal sent out his deputies that very morning to summon jurors. We oppose then to the simple declaration of Mr. Heath, unaccredited by other witnesses, the clear and strong evidence of Mr. Randolph, corroborated by that of Mr. Marshall and Mr. Basset.

It does then appear to me that none of the alleged facts are so supported as to shew an indecent solicitude on the part of the respondent.

It may, perhaps, be proper to take a general view of the conduct of judge Chase, after his arrival at Richmond.

The court met on the 22nd of May; on the 24th in the morning a presentment was found against Callender; and an indictment late in the day. When Callender was brought into court an application was made for a continuance, on a general affidavit, drawn by Callender. When this was about to be presented, if the judge had been anxious for the conviction of the prisoner, would he not have suffered it to be filed, and then said no supplementary affidavit, such is the strict principle of law, can afterwards be received. Instead of taking this course, the judge told the counsel that if the affidavit were filed it would not be regular to withdraw it; that they had better draw up a special affidavit, and take till to-morrow to consider of it. This was done. A new affidavit was offered. It did not contain grounds for a continuance of the cause to the next term; but the court offered a delay of two, four, and even six weeks; all of which were rejected.

The cause came on for trial on the 2nd of June. Two witnesses summoned had not arrived, and a delay of two hours was prayed for. The court postponed the trial until the next day. The testimony of Col. Taylor was rejected on account of its illegality; and its not applying to the whole of any

Digitized by Google

one charge—still the judge asked the prosecutor to admit it; and afterwards tells the counsel for the traverser, such is my opinion; but I am a fallible man, I may be mistaken, and if you desire it you may state your exceptions, and a superior tribunal shall decide—But the offer was not accepted. Callender, in truth, was out of the question; it was not the man, but the cause in defence of which the counsel came forward; their great object was, through an address to the jury, to impress the public mind with the unconstitutionality of the sedition law. So often as they attempted to do this, they were interrupted by the court, and all their sensibility and indignation grew out of this refusal to allow them to argue the constitutionality of the law before the jury to the by-standers.

Carry, Mr. President and gentlemen of the Senate, in your minds these facts, and you will find that the conduct of the respondent was, during the whole course of this trial, not only free from criminality, but, in all respects, justified by law and propriety.

Mr. LEE.

MAY IT PLEASE THIS HONORABLE COURT:

WE are now arrived, Mr. President, in the course of the defence, to the fifth article of impeachment. I have, sir, been led to believe, that the present prosecution is brought before this honorable court as a court of criminal jurisdiction, and that this high court is bound by the same rules of evidence, the same legal ideas of crime, and the same principles of decision which are observed in the ordinary tribunals of criminal jurisdiction. The articles themselves seem to have been drawn in conformity to this opinion, for they all, ex[illegible] t

Digitized by Google

the fifth, charge in express terms some criminal intention upon the respondent. This doctrine relative to impeachment is laid down in 4 Black, 259, and in 2 Woodeson, 611. "As to the trial itself it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevail. For impeachments are not framed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of the alleged crimes. The judgment, therefore, is to be such as is warranted by legal principles and precedents." The constitution of the United States appears to consider the subject in the same light. By the third section of the third article, "the trial of all crimes, except in cases of impeachment, shall be by jury," and by the fourth section of the second article, the nature and extent of the punishment in cases of impeachment is defined. Hence it may be inferred that a person is only impeachable for some criminal offence. With this view, I have examined and re-examined the fifth article of impeachment, to know against what the defence should be made. Looking at it with a legal eye, I find no offence charged to have been committed, and although it may seem strange, it is not the less true, this circumstance has produced the greatest difficulty and embarrassment in what manner the defence should be made.

That this honorable court may perceive that I have not misapprehended the article, I will pray leave to read it. "And whereas it is provided by the act of Congress, passed on the twenty-fourth day of September, one thousand seven

Digitized by Google

hundred and eighty-nine, intituled " An act to establish the judicial courts of the United States," that for any crime or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the state where such offender may be found; and whereas it is provided by the laws of Virginia, that, upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thompson Callender, indicted for an offence not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided."

This article charges no evil intention, no offence, no crime, yet the respondent is required to make a defence, and is to address his defence to this court as one of criminal jurisdiction.

I do not mean to produce authorities to this high and learned tribunal, to shew that a judge cannot be impeached for a mere error of judgment in any instance of his judicial conduct. I wish for none better than those produced by one of the honorable managers of the prosecution (Mr. Clarke) to prove this position, 2 Bacon, 97, and Jacob's law dictionary, title *Judges*. The elegant advocate just sat down, (Mr. Key) has fully established the same doctrine. If then this be admitted, where or what is the crime charged in the fifth article. The whole charge is, that, by authority of the judge a process called a capias was awarded against Callender, when that process ought to have been a summons. It is not alleged that the capias was awarded with any corrupt or evil intention of any kind. If then the

Digitized by Google

article contains no charge of a crime, there must be an acquittal. Upon this point I hope I may be permitted to remind the court of an observation of another of the honorable managers, who opened the comments upon the evidence for the prosecution (Mr. Early.) He stated, and he stated truly as a general rule of jurisprudence, that if there be no evil intention set forth in the charge and proved, the party accused must be acquitted. With these remarks, if this was an ordinary case before an ordinary tribunal, I might dismiss this part of the accusation, and it may seem scarcely proper to occupy the precious time of this honorable court, so near the close of its session, in defending the respondent any further against such a charge, but I feel too much respect for the House of Representatives who have preferred this article, and the honorable managers who support it, not to give it a fuller investigation.

The article may perhaps be understood to produce an important enquiry: the enquiry how far the power of impeachment possessed by the House of Representatives shall extend. Although the constitution declares that "the House of Representatives shall have the sole power of impeachment," yet I trust there is some limit to this power, and that a judge cannot be impeached for a mere legal error in his judicial conduct, when no crime is imputed to him. An impeachment is an accusation of a most serious nature, and the people of the United States have not vested the power of impeachment exclusively in the House of Representatives in Congress, but in their state governments they have established tribunals who are to possess the power of impeachment. I hold in my hand a little book which contains the most valuable matter; it contains the constitutions of the several states. By referring to them we find, in almost

Digitized by Google

every instance, that a power of impeachment may be exercised under the state authority. When, therefore, the doctrine of impeachment is about to be fixed in regard to the limits of the power of impeachment by a judgment of this high and honorable court, a judgment is about to be given that will be a precedent for the tribunals of the different states. An example is about to be set to the tribunals of the several states, that will influence and direct their decision in the construction of their constitutions relative to the power of impeachment. The words used in some of these instruments are the same, and in others nearly the same with the words in the constitution of the United States upon this subject.

Is there not some limit to the power of impeachment, a power which we find can be exercised by so many authorities in this country? If there is a limit, what better limit can be set, than that of high crime and misdemeanor in office, as appears by the language of the constitution to have been intended.

Let us now examine whether judge Chase, in issuing a capias against Callender after he had been presented for an offence not capital, has been guilty of a high crime or high misdemeanor in office. Surely the managers should have pointed to the proofs, if any there were, of a corrupt and evil intent with which this act was done. I have already referred to those parts of the constitution which shew that no impeachment can be maintained but for a crime. If the court will turn their attention to the article now under consideration, they will perceive that no crime is charged in express terms, and therefore the accused ought not to be held to answer it; but an idea has been suggested by the honorable managers, that as the article charges an unlawful act to have been done, a criminal intention

Digitized by Google

must be presumed, unless the respondent shews it to have been innocent. This principle, however true it may be in some cases, is not applicable to the present case. If the act charged be *malum in se*, the rule of law may be as has been stated, but if the act be *malum prohibitum*, the rule is otherwise.

In order that the honorable court may not have the least difficulty on this subject, I will undertake to shew that the learned judge acted, in this instance, strictly according to law, and if this be shewn, there will remain no foundation for the present charge.

It is well established as a general rule of jurisprudence, that a court which has jurisdiction over an offence, may award process concerning it, and compel the party to appear. This may be seen in 2 Hawk. pleas, ch. 13, sec. 15, 16. The cognizance of offences against the statutes of Congress is vested in the circuit courts of the United States, 1 vol. laws of U. S. pa. 55. From the principle just stated, the circuit court acquired the power of awarding process to compel such offenders to appear in that court when they became vested with a power to try the offence. A presentment or indictment of a grand jury is sufficient evidence to authorise the court to award process against the offender. This is not only the evidence upon which a court usually proceeds, but it is recognized in the fifth article of the amendments to the constitution. We find there a restriction upon the power of the courts; "no person shall be held to answer for a capital or other infamous crime, unless by a presentment or indictment of a grand jury, &c." which restriction carries the implication, that by a presentment or indictment, the party shall be held to answer. If an offender may be held to answer to an accusation in this form, it follows as a matter of course, that the court is bound to award process to compel him to answer.

Digitized by Google

I know no process by which a person can be apprehended except by a capias. In the present trial we have heard of a bench warrant, but that too is a capias awarded by a judge sitting in court. In all cases of misdemeanors where the punishment is by imprisonment or fine, a capias is proper process, according to the practice of the king's bench in England. For this I refer the court to a passage read at another day from Gilbert's treatise upon the origin of the king's bench, page 308. So also the doctrine is laid down by judge Blackstone, in regard to those cases where it is not intended to proceed to outlawry, 4 Black. Com. 319.

A capias, therefore, in the case of Callender, was the proper process, according to common law principles, and the English authorities of modern date. In reason and common sense, a capias is the proper process where the offence is punishable by imprisonment, and we all know that Callender was charged with an offence punishable by fine and imprisonment. In such a case, a summons would be a notification to the offender to abscond or remove himself out of the reach of the court.

If any doubt can yet remain as to the propriety of issuing the capias, it will be entirely removed by attending to the laws of the United States. The 14th sec. of the "act to establish the judicial courts of the United States," gives power to the circuit courts to *issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usage of law*, and the 11th sec. of the same act gives exclusive cognizance of all crimes and offences cognizable under the authority of the United States to the circuit courts, except otherwise directed by that or some other statute. The court which awards the writ, is to decide what process is necessary for the exercise of its jurisdiction, and agreeable to the principles and usage of law in each particular case.

Digitized by Google

The 33d sec. of the same statute contains a great deal of important matter in regard to the present enquiry. "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expence of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States, as by this act has cognizance of the offence: And copies of the process shall be returned as speedily as may be, into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate, before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute a warrant for the removal of the offender, and the witnesses or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence and the usages of law. And if a person committed by a justice of the supreme, or a judge of a district court for an offence not punishable with death, shall after-

Digitized by Google

wards procure bail, and there be no judge of the United States, in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such state."

Here it is expressly authorised that a judge of the circuit court may order a process for the *arrest* of the accused for any crime or offence against the United States, agreeably to the usual mode of process of arrest against offenders in the state where the court is holden, and the offence committed. A summons is not authorised by the section, because a summons is not a process of *arrest*. I call upon the learned managers to point out any other process by which a person can be arrested, even in Virginia, except by a capias. In England, in Virginia, in Maryland, in every state, the process of *arrest* is by a capias.

There is another statute of Congress on the subject of process, which passed on the second of March, 1793. It contains eight sections, and relates as well to *criminal* as *civil* matters. The seventh section is in the words following, "That it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering up judgment by default, and other matters in the vacation, and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, *and especially to that end to prevent delays in proceedings.*"

I know not what language can convey a more complete power to the court over its process, than is given by the passages from the statutes which have been cited. An uniform rule in the courts of

Digitized by Google

the United States is very desirable, that offenders and criminals may be brought to trial by the like forms in every state, for violations of the statutes of Congress. To allow one kind of process in Virginia, and a different one in Maryland for the same offence, would be an heterogeneous and unequal mode of administering justice. A construction ought not to be given to the statutes of Congress, which admits of such a system, if it may possibly be avoided. Shall it be said that in one state a man who publishes a libel shall be arrested immediately and brought to trial and punished, while in another state another person who has committed the same offence, shall be served with a process that shall be notice to him to make his escape: and shall it be said that such a rule shall be applied to cases where imprisonment is part of the punishment? It has been in proof, that in Maryland it is usual to arrest by capias in cases of misdemeanor, and to try the traverser at the same term at which he appears: Are the courts of the United States, if sitting on one side of the Potomac, to be governed by one rule; and, if sitting on another side of the same river, to be governed by another rule, in cases of crime or offence against the laws and constitution of the United States? It can never have been the intention of Congress, that any such variety of proceeding should be allowed in practice, or that the process should be any where a summons, in cases of offences which were to be punished by imprisonment.

This can be further illustrated by attention to the laws of Congress inflicting punishment upon certain crimes passed in the year 1790; for perjury, for bribery, for obstructing by force the service of legal process, for importing slaves from foreign parts, for violence to an ambassador and for other

Digitized by Google

offences relative to ambassadors, the punishment is fine and imprisonment. See 1st vol. Laws of the United States, page 111. The process in all these cases is to be the same; if a capias is proper in one it is proper in all, or if a summons is necessary in one it is necessary in all.

Suppose in regard to an ambassador who has applied to our secretary of state for the punishment of an individual, who may have done violence to his person or to one of his family, that a summons shall have been issued to the offender who should abscond or remove himself. It would be deemed very strange, perhaps incredible to the ambassador, if he should be told by our secretary of state, that the offence being committed in Virginia, it was necessary to summon the party to appear before the court, and instead of obeying the summons he had removed himself entirely, but if the same matter had been prosecuted in Maryland, the offender might have been instantly arrested and punished; the President of the United States regretted that the offender had escaped with impunity, but the escape was according to law. Would not such an explanation be apt to be conceived an affront to the understanding of the ambassador?

On a former occasion I read a rule of the supreme court, made in August 1792, by which the judges declared, "that they considered the practice of the courts of king's bench in England, as affording outlines for the practice of this court, and that they will from time to time make such alterations therein as circumstances may render necessary:" and on the same occasion reference was had to the practice of the king's bench, to shew that a capias was a proper and usual process. But it is neither necessary nor correct to admit that the rule of the king's bench in England is absolutely a rule for the circuit courts of the United States. It

Digitized by Google

furnishes a good outline of practice. The true position is, that neither the king's bench nor the state laws furnish rules to the federal courts in regard to process, which are positively binding on them, but these courts are to establish their own rules under the direction and control of the statutes of the United States.

It is a known and undisputed maxim, that the criminal code of each sovereign state furnishes the rule in prosecutions in the state courts, and is confined to offences against such state. An offence against the commonwealth of Virginia, is not an offence against the United States; and therefore the laws of Virginia which regard offences against itself, will have no effect touching offences against the United States, unless Congress by their express statute has given to them some effect. The laws of Virginia and of every state, have declared how an offence against such state respectively shall be prosecuted, but they are not to be applied to the circuit court of the United States, sitting in such state, and holding cognizance of crimes against the United States. In confirmation of this doctrine, suffer me to avail myself of the opinions of some very distinguished characters in the Virginia convention which adopted the constitution. An eminent judge who presided in the highest court of that state for a long space of time, I mean judge Pendleton, laid it down as too clear to be disputed, that the powers of the federal judiciary should be co-extensive with the powers of the federal legislature. In this opinion, Mr. George Mason coincided with that gentleman, although he was opposed to him on almost every other. Of the same opinion was another distinguished member of the convention, who now holds the high office of secretary of state. (3d vol. Virginia debates, pages 108, 121, 190.)

Digitized by Google

Unless then Congress has made the laws of each state the rules of process to bring offenders before the circuit courts, those laws do not bind the circuit courts in this respect, and there will be no foundation for the doctrine, that a circuit court of the United States ought to be governed by the laws of a state in respect to process to bring the party to answer. Where is such a statute of congress? Not in their statute books, as I humbly conceive none such has been produced.

The honorable managers have referred to the 34th section of the statute already mentioned, and upon that alone they rely. The words of the section are as follows: "*And be it further enacted*, That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded *as rules of decision in trials at common law in the courts of the United States, in cases where they apply.*" We are to take the whole expressions of the section together, and this section is to be considered conjointly with all the other provisions of the statute. It makes the laws of a state the rules of decision *in trials at common law where they apply*. The laws of the state are to be rules of decision in trials. The process which is awarded to bring in a party to stand his trial, is obviously different from the trial itself: rules *of decision in trials*, are not rules of *process* antecedent to the appearance of the party. What is a trial at common law? A trial may be said to begin with impanelling a jury, and to end with the judgment of the court: 4 Black. 352. A capias that is issued for the purpose of bringing the party to a *trial* by arresting his person, cannot therefore be deemed a part of the trial itself. Whether the traverser appears with or without process, is seldom deemed material; it is only after he is brought to answer that his trial can commence.

Digitized by Google

If the construction contended for by the managers be admitted, it will make this section militate against the 14th and 33d sections of the same statute, which expressly provide upon the subject of process. Besides, it is unnecessary to give this construction, inasmuch as the statute provides amply respecting the steps preparatory to the trial. The 29th section regulates the mode of summoning a jury. There is no defect in the provisions of the statute which establishes one system that is to prevail every where, in regard to matters prior to the trial. Why would Congress provide, in respect to process, as they have done in the 14th and 33d sections, if they meant to adopt the various laws of each state in regard to process, as has been contended by the managers ? Congress has declared what kind of process may be used in the circuit courts, and that process of arrest may be used. Our construction is warranted by the rule of the supreme court that has been quoted, which rule was made long after the statute of 1789, and which statute is as obligatory on the supreme court as upon a circuit court. It is also warranted by the judgment of the circuit court in Pennsylvania district, in the case of the United States against the insurgents, determined in the year 1795, before the respondent was elevated to the bench of the supreme court (2 Dal. 340, 341.)

In giving his opinion on the 34th section of the statute, judge Peters observes, " although in ordinary cases it would be well to accommodate our practice with that of the state, yet the judiciary of the United States should not be fettered and controled in its operations, by a strict adherence to state regulations and practice. As to the clause in the law of the United States, directing that " the laws of the states (with great exceptions) shall be regarded as rules of decision in trials at

Digitized by Google

common law in the courts of the United States," I do not think it applies to the case before us."

In conformity to the rule of the supreme court and the authority of the case just cited, judge Chase determined that the laws of the state of Virginia, which require a summons to be issued in cases of the commonwealth, did not apply to the court of the United States. Why, let me again ask, should this section receive the construction contended for by the honorable managers? It has been shewn that the laws of the United States provide fully in regard to the process to be issued by their courts: that for the furtherance of justice, such a construction is neither necessary nor convenient, and is inconsistent with other parts of the same statute. It was therefore perfectly correct in the court to bestow no attention upon the laws of Virginia concerning the process to be awarded against Callender. When a presentment was found by the grand jury, it was the duty of the court to act; it was their duty to award a proper process for arresting the offender. This is not only warranted by the principles and reasons already adduced, but is inferable from various passages of the laws of Congress, particularly from the 19th and 20th sections of the statute passed 30th April, 1790, 1st vol. page 108.

The learned counsel who defended Callender, appear from the testimony to have taken up some improper opinions relative to the criminal code of the United States. The subject was, as they say, new to them, and for this reason let me remark, they might readily have fallen into error. It appears that they not only thought it was competent for a jury to decide upon the constitutionality of a law, but also that it belonged to the jury to assess the fine upon the traverser, because a jury has that

Digitized by Google

power by the laws of the state in respect to offences against the state. In the like manner it is erroneously said in the present prosecution, that the laws of the several states in respect to process, are the rules which should guide the circuit courts of the United States.

I have, sir, endeavored to shew in the first place, that there is no charge of criminality stated in the fifth article of impeachment, and therefore the respondent ought to be acquitted. And, in the second place, I have endeavored to satisfy this honorable court, that the act stated in the article to have been done by judge Chase, was correct and legal in itself, and if legal, there remains no ground to presume or infer the smallest degree of evil intention. In this point of view he will also stand acquitted.

I will now proceed to make some observations upon the sixth article of impeachment: "And whereas it is provided by the 24th section of the aforesaid act, intituled "An act to establish the judicial courts of the United States," that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States, in cases where they apply; and whereas by the laws of Virginia it is provided, that in cases not capital, the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall be made; yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial, during the term at which he the said Callender, was presented and indicted, contrary to law in that case made and provided."

Digitized by Google

The charge in this article against the respondent is in substance that he, with intent to oppress and procure the conviction of Callender, ruled him to trial during the term at which he was presented and indicted, contrary to the laws of Virginia, which it is alledged have provided that in cases not capital, the offender shall not be held to answer any presentment of a grand jury until the next succeeding court.

This article it is admitted does contain an accusation of crime; but I hope I shall be able to satisfy this honorable court, that in this instance no crime or offence was committed. I shall undertake to shew that no error in law was committed, and that if the judge had done otherwise, he would have been more liable to censure than he now is. If this be made to appear, as a supposed illegality of his conduct is the foundation of the charge, there will remain nothing to support the charge.

The accused judge had sworn to support the constitution of the United States, and to administer justice without respect to persons, and to perform all the duties of his office according to the laws of the United States. If in ruling Callender to trial at the same term at which he was indicted, he acted according to law, the judge performed his duty and ought not to be charged with oppression.

The article may be understood as affirming, that there exists some law of Virginia which positively prohibits the trial of a misdemeanor at the same term at which the indictment is found. No such law has been produced, and I must be allowed to deny that any such law of Virginia exists. The act of assembly of 1788, which provides that "upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons or other proper process against the per-

Digitized by Google

son or persons offending, to appear and answer such presentment at the next court," appears to have given birth to the idea that an offender may not be tried for a misdemeanor at the same term he is indicted. It however does not warrant the position. When the party appears and answers the presentment, the trial may immediately take place. When the party appears and answers an indictment, the trial may immediately take place, *if* so ruled by the court, who are vested with a discretion unfettered by any positive statute. The defence of this article may therefore be placed on two grounds, either of which will be sufficient. 1st. There is no law of Virginia which prohibits the trial of a misdemeanor at the same term the indictment is found: and 2ndly. If there be such a law, the same is not binding on the courts of the United States, in respect to offences against the United States.

With respect to the first ground, in addition to what was said it may be observed, that some instances have been proven before this honorable court, of trials in the state courts of indictments for misdemeanors, at the same term they were found. Mr. Robertson stated two specific cases where the punishment might be imprisonment. These instances shew there can have been no such positive prohibition by the laws of Virginia, as the article of impeachment has alledged; howsoever that may be, such a law, and that in the general practice of that state there are some exceptions, or such a general practice would not be obligatory on the courts of the United States, which is the second ground of defence against this charge.

A great deal which has been said in relation to the 5th article, applies with equal force to the article now under discussion.

When the supreme court by their rule of court deliberately formed, declared that the practise of the king's bench should form outlines for the prac-

Digitized by Google

tice in their court subject to the alterations they might make, it was reasonable and natural for the circuit court, composed of justices of the supreme court, to conduct its business upon the like principle. In the king's bench, process may be returnable immediately. Gilbert's origin of king's bench, page 313. 2. Hawk, ch. 3. sec. 14. 4. Black. 319. and such is the practice if the offence is committed in the county where the court sits; but if the offence is committed in another county, the process may be returned to any day the court will appoint. The object of the court in using its discretion will be to insure the service of the process, and its due return by allowing sufficient time according to circumstances for that purpose. It is not denied that *venire facias* is *a proper* process in cases not capital, but it is not *the only* process that may be issued. Judge Blackstone who wrote since Hawkins in the passage cited, declares that a capias is a usual process from the king's bench, and may be returnable at the pleasure of the court, but that in strictness there ought to be a *venire facias* where it is intended to proceed to outlawry. In the United States under the statutes of congress, there can be no proceeding to outlawry, and therefore the reason for awarding a *venire* in England, does not hold in the United States in regard to prosecutions in their courts. But let the practice of the king's bench be as it may, it is merely to be used as an outline by our judges who will guide and direct themselves by the statutes of the United States, and will act in conformity to them. When process has been served and the offender brought into court to answer an indictment already found, it is the duty of the court to proceed to the trial. Such will be shewn to be the manifest direction of the laws of the United States. As to the laws of Virginia, it is repeated, there is no legislative act of that state which fixes

Digitized by Google

postively the time of trying an indictment for a misdemeanor, and if there were, it would not bind the federal court. The *time* of a trial is not the trial, but a circumstance, which, as well as the *place* of trial, is subject to the laws of the United States.

But it has been said in support of this article, that in England it is not usual or according to the general ccurse of proceedings, to try petty misdemeanors at the same court that the traverser pleads. For this is cited 4 Black. 351. and it is also said that the practice of Virginia conforms to the practice in England in this instance. Let this be admitted, and what does it avail. The practice that has been mentioned applies only to *petty* misdemeanors, and the law has always distinguished between petty misdemeanors and those of a greater malignity. The practice does not apply to what are termed *crimina majora.* Can it be said that such a rule of practice applies to the case of Callender. Was he indited for a petty misdemeanor? no, sir, he was not. I have long learned to abhor the detestable crime of calumny. A calumniator is the greatest of criminals, and Callender has been the greatest of calumniators. All have agreed in reprobating the wickedness of his calumnies; and ought the honorable judge who is now answering before you to have applied the rule of English and Virginia practice concerning petty misdemeanors to such a case as that of Callender? certainly not.

To place this matter still more clear of doubt, I wish the honorable court to turn their attention to the constitution, and to a few clauses of the laws of the United States. The sixth amendment to the constitution provides, "that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been com-

Digitized by Google

mitted." In the same spirit of speedy justice, a clause in the 33d section of the statute directs, that "copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognisances of the witnesses, for their appearance to testify in the case, which recognisances the magistrate before whom the examination shall be, may require on pain of imprisonment; and if such commitment of the offender or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute a warrant for the removal of the offender and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, &c."

With the same view to a speedy trial, the 7th section of the statute of 2nd March, 1793, enacts, "that it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, &c. and otherwise in a manner not repugnant to the laws of the United States to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." Hence it is evident, that in bringing Callender to trial at the same term at which he was indicted and at which he pleaded, the court obeyed the injunction of the constitution, and it obeyed the injunction of the laws of the United States.

In cases where bail is requirable to delay, the trial may be used to the oppression of the accused. It

Digitized by Google

is therefore injoined by the constitution and by the laws, that there shall be no delay. If the honorable judge who stands accused of trying Callender too soon, had deferred the trial to another term, that is to say six months, and the traverser could not have given bail, he would have been imprisoned six months without a trial. After he was convicted, the sentence of imprisonment pronounced by the same judge was only an imprisonment of about nine months. He acted therefore not only according to law, but with humanity in bringing the traverser to trial at the same term at which he was indicted. If the trial had been postponed to another term, and Callender in the mean time had been imprisoned, such a conduct in the court would have given cause of complaint against the judge, who would then have been accused of postponing the trial of an innocent man, for the purpose of oppression. What in such a case ought the judge to have done? Exactly what he did. Obeying the constitution and the laws of the United States, he brought the traverser to a speedy and public trial.

It is, may it please the honorable court, upon these grounds that the respondent stands justified in his conduct, in relation to the charge contained in the sixth article of impeachment.

In the distribution of the articles of impeachment among the counsel of the respondent he assigned to me the 5th and 6th, and I humbly indulge the hope that the defence which has been made, will be deemed satisfactory. But before I conclude, I hope I may be allowed shortly to advert to some of the remarks which have fallen from the honorable managers in respect to this part of the accusation.

The honorable managers have attempted to shew a difference between a presentment and an indictment, and that until the indictment was found, a

Digitized by Google

capias ought not to have been issued, even if it were lawful to issue it upon an indictment. That there is no such distinction, I appeal to those passages of the acts of congress to which reference has been already made. I appeal to the reason of the thing and to the nature of a presentment. It is a species of indictment, an informal indictment, it is an accusation of a grand jury. There are cases where it would be improper in a court to wait until a presentment shall be put in the form of an indictment. Circumstances may be such, that the offender would escape if process was not issued upon the presentment.

One of the honorable managers charged the respondent with precipitancy in awarding the capias. If this gentleman had recollected the testimony, he would not have made that remark. It was undeniably proved that the respondent enquired of the clerk of the court and of the district attorney, what was the proper process. These officers answered, that a capias was the proper process.—Upon such subjects it is usual to enquire of such officers, and their answer is generally deemed sufficient by the courts.

It was in proof, that judge Chase informed the counsel of Callender they might except to any opinion given by the court, he would sign their bill of exceptions and be the first man to grant a writ of error; this was intended to shew, that the respondent had no disposition to injure or oppress the traverser. To obviate any influence of this circumstance favorable to the respondent it was intimated, perhaps asserted by some of the managers, that no writ of error could be maintained in such a case of criminal prosecution, and that judge Chase well knew it, and that the offer was made merely for a cloak to his injustice and oppression. This idea seemed to be derived from certain opinions of

Digitized by Google

Virginia jurisprudence, and it was attempted to be proved that in Virginia, a writ of error did not lie in a criminal case and had never been granted and sustained in that state in its courts. This however can be and will be readily disproved. Although one of the witnesses, Mr. Hay, did not recollect with precision whether there was any bill of exceptions in the cases concerning the Berkley clerk, which were carried from the district court into the court of appeals; yet another of the witnesses, Mr. Nicholas, the attorney general of Virginia, well remembers there was. Until these cases were decided, which happened several years after the trial of Callender, it was the received law of that state for the court of appeals to hold jurisdiction as a court of errors over criminal prosecutions. In support of this doctrine I refer to the case of Newall against the commonwealth, adjudged in the year 1795. 2 Washington's Reports, 88. It was against a magistrate for bribery in his office, and the judgment was reversed with costs. Also I refer to the case of Jones against the commonwealth, adjudged in the year 1799. 1st Call's Reports, 555. This was an indictment for an assault, and the judgment was reversed. It is true that since the trial of Callender these cases have been overruled, yet as the established law was different at the time of his trial, the offer of the judge to grant a writ of error in the manner which has been proved, ought not to be attributed to any unjust or improper motives.

The learned counsel who spoke last stated the practice in Maryland to be, to award a capias and to try the traverser at the first term at which he pleads. This has been fully proved. As the respondent long presided in the criminal court of Maryland, with honor to himself and great usefulness to his country, it was quite natural for him to follow the like practice in Virginia.

Digitized by Google

It has been objected that the judge misconducted himself towards the counsel during the trial of Callender in various instances, which it has been argued proceeded from a desire to convict and punish the traverser, howsoever innocent. I will observe with great deference, that if in the opinion of some gentlemen the judge did not act with becoming politeness to the counsel, it is not a high crime or misdemeanor, that may be examined or tried in this honorable court. But I trust upon a review of the circumstances as they have been given in evidence, that this court will be of opinion that the respondent behaved to the counsel with sufficient propriety. One of the counsel, Mr. Wirt, offered to the court a syllogism, to which the honorable judge promptly replied in a technical phrase of logic, and this excited in the audience some diversion. When another of the counsel, Mr. Nicholas, was speaking on the favorite topic of the right of the jury to consider the constitutionality of the sedition law, he was not interrupted by the judge. But Mr. Nicholas has been proved to have been always civil, always respectful to a court of justice; consequently the court would be civil to him. A third counsel, Mr. Hay, who was extremely desirous as he has himself testified, to make an oration, not only for the purpose of satisfying the jury but the audience, that a jury had a right to judge of the constitutionality of the sedition law, was interrupted by the judge, who denied his position. Mr. Hay had stated other matters during the trial which appeared to the judge to be erroneous. He had stated that a jury in this case of Callender, was the proper tribunal to assess the fine, in which he had been corrected by the court; that one of the jurors, Mr. Bassett, was not qualified to serve, &c. His zeal in the cause of liberty and the constitution, made him pertina-

Digitized by Google

cious in some things which the judge pronounced to be errors. It was no wonder then that such an advocate was stopped and often interrupted by the court. If any thing was done amiss by the judge during the trial, it was his desiring Mr. Hay to proceed in his own way, and promising to interrupt him no more let him say what he would: but this circumstance plainly evinces that the interruptions did not arise from corrupt motives. It may truly be said that judge Chase, in his behavior to counsel, was "all things to all men." To the logical Mr. Wirt, he was logical: to the polite Mr. Nicholas, he was polite: to the zealous and pertinacious Mr. Hay, he was warm and determined. If the counsel had conducted themselves with propriety towards the court, there would have been no interruptions; but when the judge found that the opinions of the bench were slighted, and that the conduct of the bar had a tendency to mislead and influence the public mind against a statute of congress, he endeavored to turn their sentiments and reasoning into ridicule, and he produced by his wit a considerable degree of merriment at their expence, of which no doubt colonel John Taylor, who has proved it for the prosecutors, was, from his natural temper, a full partaker.

Mr. President, it is now a very late hour, and I will bring my observations to a close. The articles relative to Fries and Callender have been fully investigated: there is neither uncertainty or doubt as to the facts. I flatter myself that it has been shewn that those charges have not been supported by the evidence, and that the impeachment has proceeded from misinformation. If the honorable House of Representatives had known as much as has been disclosed to this honorable court, they would not have deemed it necessary to have brought forward an impeachment. All must now be satis-

Digitized by Google

fied that the information on which the articles are grounded, has been derived from mistaken sources both in regard to fact and law. An aggregate body cannot be better guarded against misinformation than an individual: and I am induced to believe from the known integrity and virtue of the House of Representatives, they will hear with satisfaction, that the evidence which they received was not the same which has been delivered before this honorable court, and that they will take pleasure in the acquittal of the respondent.

You are now about to set an example in a case of impeachment which will have a most important influence in our country. It will be an example to the tribunals in the several states who like you possess the power of trying impeachments, and who may learn from you by what rules the doctrine of impeachment is to be regulated: It will be a polar star to guide in prosecutions of this kind. You are about to set an example to the ordinary tribunals of justice in every corner of the United States. They will know how this high court has done justice between the House of Representatives of the American nation and a single individual, and hence they may learn how to do justice to the most weak and friendless individual, when accused in their courts by the most powerful. An upright and independent judiciary is all important in society. Let your example be as bright in its justice as it will be extensive in its influence. If the people shall find that their confidental servants, the House of Representatives, have brought forward an accusation against another of their servants for high crimes and misdemeanors in his exalted office, which after a fair and patient hearing has not been supported by evidence, it will afford them pleasure to hear of his honorable acquittal, and such may it please this

Digitized by Google

honorable court will be, I trust, the result of your deliberations.

SATURDAY, FEBRUARY 23.

MR. MARTIN.

MR. PRESIDENT,

DID I *only* appear in defence of a friend, with whom I have been in habits of intimacy for nearly thirty years, I should feel less anxiety on the present occasion, though that circumstance would be a sufficient inducement; but I am, at this time, actuated by superior motives. I consider this cause not only of importance to the respondent and his accusers, but to my fellow citizens in general, (whose eyes are now fixed upon us,) and to their posterity, for the decision at this time will establish a most important precedent as to future cases of impeachment.

In the discussion of this cause, I fear I shall occupy a greater portion of your time, than I could wish, but, as the charges are brought forward by such high authority as the House of Representatives of the United States, it becomes necessary to bestow upon them more attention than they would deserve, were they from a less respectable source.

We have been told by an honourable manager, (Mr. Campbell) that the power of trying impeachments was lodged in the Senate with the most perfect propriety; for two reasons—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the constitution were influenced, when they gave this power to the Senate. Who are the officers liable to impeachment? The *Pre-*

Digitized by Google

sident, the *Vice-President*, and all civil officers of government. In the election of the two first, the Senate have no control, either as to nomination or approbation. As to *other* civil officers, who hold their appointments during good behaviour, it is extremely probable, that, though they were approved by one Senate, yet from lapse of time, and the fluctuations of that body, an officer may be impeached before a Senate, not one of whom had sanctioned his appointment, not one of whom, perhaps, had he been nominated after their election, would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over *these* officers. But as a second reason, he assigned, that, if any other inferior tribunal had been entrusted with the trial of impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed, in order to obtain his place; but, that no Senator could have such inducement. I, sir, disclaim, I hold in contempt the idea, that the members of *any* tribunal, would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this Senate, more than any other court, from being thus influenced? Is there any thing to prevent any member of this Senate, or any of their friends, from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honourable court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honourable client with uprightness and impartiality. I have only made these observations, to shew, that the reasons assigned by the honourable manager for vesting the trials of impeachment in the Senate, are fallacious.

Digitized by Google

I see two honorable members of this court, [Messrs. Dayton and Baldwin] who were with me in the convention, in 1787, who as well as myself, perfectly know why this power was invested in the Senate. It was, because, among all our speculative systems, it was thought this power could no where be more properly placed, or where it would be less likely to be abused. A sentiment, sir, in which I perfectly concurred; and I have no doubt, but the event of this trial will shew that we could not have better disposed of that power.

Let us now, sir, examine the *Constitution* on the subject of impeachments, and from thence learn, in what cases, and in what only, impeachments will lie. To have correct sentiments on this subject, is of infinite importance. An error here, would be like what is called, an error in the first concoction, and would pervade the whole system.

By the constitution, it is declared, that "the House of Representatives shall have the sole power of impeachment." That section, however, doth not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend, that the power of impeachment is confined to the persons mentioned in the constitution, namely, "the President, Vice-President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the House of Representatives have a right to impeach *every citizen indiscriminately?* For *what* shall they impeach them? For *any* criminal act? Is the House of Representatives, then, to constitute itself into a Grand Jury to receive information of a criminal nature, against all our citizens, and *thereby to deprive them of a trial*

Digitized by Google

by jury? This was never intended by the constitution.

The President, Vice-President, and other civil officers, can *only* be impeached. They only *in that case* are deprived of a trial by jury;—they, when they accept their offices, accept them on those terms, and as far as relates to the *tenure* of their offices, relinquish that privilege; they, therefore, cannot complain. Here it appears to me, the framers of the Constitution, have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the third, of the Constitution, it is declared, that judgment, in all cases of impeachment, shall not extend further than removal from office, and disqualification to hold any office of honor, trust or profit under the United States. This clearly evinces, that no persons but those *who hold offices* are liable to impeachment. They are to lose their offices; and, having misbehaved themselves in such manner as to lose their offices, are, with propriety, to be rendered ineligible thereafter.

The next question of importance, is, in what cases the House of Representatives have a right to impeach the President, the Vice-President, and the other civil officers.

It has been said, that a judge cannot be indicted for the same crime, for which he may be impeached: for, says the honorable manager, (Mr. Campbell) it would introduce the absurdity, that a person might be twice punished for the same crime.

This honorable court will observe, that the *two punishments*, which may *here* be inflicted on *impeachment* and *subsequent indictment*, amount to no more than in *England* takes place on a *single prosecution*; for there, on a *single* conviction, a

Digitized by Google

judge may be removed from office, and *also* fined, imprisoned, or otherwise punished, according to the nature of his offence. But the *whole* of this power the United States have not vested in the *same* body. To the *Senate* they have *confined* the punishment of *removal from office*, and disqualification of the person from holding offices in future; but can there be a single doubt that a person, by impeachment, removed from office, cannot afterwards, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? what are the crimes for which an officer can be impeached? "Treason, bribery, and other *high* crimes and misdemeanors."

Suppose a judge removed from office, by impeachment, for treason, would that wash away his guilt? would he not afterwards be liable to be indicted, tried and punished as a traitor? undoubtedly he would, so in the case of bribery. Yet, if the gentleman's idea is correct a removal from office on impeachment, for either of those crimes, would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the managers, that a judge is only removable from office on account of crimes committed by him as a judge, and not for those, for which he would be punishable as a private individual! A judge, then, might break open his neighbour's house and steal his goods;—he might be a common receiver of stolen goods; for these crimes, he might be indicted, convicted and punished, in a court of law; but yet he could not be removed from office, because the offence was not committed by him in his judicial capacity, and because he

Digitized by Google

could not be punished *twice* for the same offence.

The truth is, the framers of the constitution, for many reasons which influenced them, did not think proper to place the officers of government in the power of the two branches of the legislature, further than the tenure of their office—Nor did they choose to permit the tenure of their offices, to depend upon the passions or prejudices of jurors.—The very clause in the constitution, of itself, shews that it was intended, the persons impeached and removed from office might still be indicted and punished for the *same* offence, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for *one offence*, could prevent the same person from being indicted and punished for *another* and *different offence*.

I shall now proceed in the enquiry, *for what* can the President, Vice-President, or other civil officers, and consequently, for what can a judge, be impeached? and I shall contend that it must be for an *indictable* offence. The words of the Constitution are, that "they shall be liable to impeachment for treason, bribery, or *other high* crimes and misdemeanors."

There can be no doubt but that treason and bribery are *indictable* offences. We have only to enquire then, what is meant by *high* crimes and misdemeanors. What is the true meaning of the word "*crime*?" It is the breach of some law, which renders the person, who violates it liable to punishment. There can be no crime committed where no such law is violated. The honorable gentleman to whom I before alluded, has cited the new addition of Jacob's Law Dictionary; let us

Digitized by Google

then look into that authority for the true meaning of the word "*misdemeanor.*" He tell us

"*Misdemesnor, or misdemeanor, a crime less than Felony. The term misdemeanor is generally used in contradistinction to felony, and comprehends all indictable offences, which do not amount to felony, as perjury, libels, conspiracies, assaults,* &c. *see* 4. Comm. c. 1. p. 5.

"*A crime or misdemeanor, says Blackstone, is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which properly speaking are mere synonymous terms; though in common usage, the word crimes is made use of to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentle name of misdemeanors only.*

"*In making the distinction between public wrongs and private, between crimes and misdemeanors, and civil injuries, the same author observes, that public wrongs, or crimes and misdemeanors are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social aggregate capacity.*" 4 Comm. 5.

Thus it appears, crimes and misdemeanors are the violation of a law, exposing the person to punishment; and are used in contradistinction to those breaches of law, which are mere private injuries, and only entitle the injured to a civil remedy.

Blackstone's Commentaries, 4th vol. page 5th, is cited by Jacob, and is as there stated. I shall not turn to it. Hale, in his pleas of the Crown, volume first, in his *Præmium*, which is not paged, speaking of the division of crimes, says,

Digitized by Google

" *Temporal crimes, which are offences against the laws of this Realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments that are by law appointed for them, or in respect of their nature or degree; and thus they may be divided into capital offences, or offences only criminal, or rather, and more properly into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors by acts of Parliament.*"

Thus then it appears, that crimes and misdemeanors are generally used as synonimous expressions, except that " crimes" is a word frequently used for *higher* offences. But while I contend that a judge cannot be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached, unless immediately relating to his judicial conduct. Let us suppose a judge, provoked by insolence, should strike a person; this certainly would be an *indictable*, but not an *impeachable* offence. The offence for which a judge is liable to impeachment, must not only be a crime or misdemeanor but a *high* crime or misdemeanor. The word " crime" as distinguished from misdemeanor, is applied to offences of a more aggravated nature, the word " *high*," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, Sir, I am ready to go further, and say, there may be instances of *very high* crimes and misdemeanors, for which an officer ought not to be impeached, and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person, who committed them, with *turpitude* and *infamy*; such as shew there can be no dependence on that

Digitized by Google

integrity and honor which will secure the performance of his official duties.

But we have been told, and the authority of the state of Pennsylvania has been cited, by one honorable manager (Mr. Rodney) in support of the position, that a judge may be impeached, convicted, and removed from office, for that which is not indictable, for that which is not a violation of any law.

What, sir, can a judge be impeached and deprived of office, when he has done nothing which the laws of his country prohibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the House of Representatives to impeach, for conduct not *criminal*—the Senate to convict, doth that change the law? No, the law can only be changed by a bill brought forward by one House *in a certain manner*, assented to by the other, *and approved by the President.* Impeachment and conviction cannot change the law, and make that *punishable* which was not *before criminal.*

It is true, it often happens that the good of the community, requires that laws should be passed, making criminal and exposing to punishment conduct, which antecedently was not punishable; but even in those cases, government has no power to punish acts *antecedently* done; it can only punish those acts done *after* the enaction of the law. The constitution has declared, "no *ex post facto* law shall be passed."

Should *such* a principle be once admitted or adopted, could the officers of government ever know how to proceed? Admit that the House of Representatives have a right to impeach for acts which are not contrary to law, and that thereon the Senate may convict, and the officer be removed, you leave your judges, and all your other officers

Digitized by Google

at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, sir, with a view to censure the principles or the conduct of any party, which hath prevailed in the United States since our revolution, but I wish to bring home to your feelings what may happen at a future time. In republican governments there ever have been,—there ever will be, a conflict of parties. Must an officer, for instance a judge, ever be in favor of the ruling party, whether wrong or right? Or looking forward to the triumph of the minority, must he, however improper their views, act with them? Neither the one conduct or the other is to be supposed but from a total dereliction of principle. Shall then a judge, by honestly performing his duty, and very possibly thereby offending both parties, be made the victim of the one or the other, or perhaps of each, as they have power? No, sir, I conceive that a jude should always consider himself safe while he violates no law, while he conscientiously discharges his duty, *whomever* he may displease thereby.

But an honorable manager (Mr. Campbell) hath read to us an authority to prove, that a judge cannot in England be proceeded against by indictment for violation of his official duties but only in Parliament, or by impeachment; his authority was the new edition of Jacob's law dictionary. Let me be indulged with reading to this honorable court the case from 12 Coke, the case of Floyd and Barker, to which Jacob refers, and it will be found that the reasons there assigned, however correct they might be as to judges in England, can have no possible application to the judges of the United

Digitized by Google

States; [Here Mr. Martin read the following part of the third resolution in that case, to wit:]

"*It was resolved that the said Barker who was judge of assise, and gave judgment on the verdict upon the said W. P. and the sheriff who did execute him according to the said judgment, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgment, were not to be drawn in question, in the Star-chamber, for any conspiracy; nor any witness, nor any other person ought to be charged with any conspiracy in the Star-chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony and although the offender upon the indictment was acquitted, yet the judge, be he judge of assise, or a justice of peace, or any other judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in court as judge or justice of peace: and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice, will do injustice, but if he hath conspired before, out of court, this is extra-judicial, but due examination of causes out of the court, and enquiring by testimony, and similar, is not any conspiracy, for this he ought to do; but subordination of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy.*

"*And as a judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the king.*

"*And the reason and cause why a judge, for any thing done by him as judge, by the authority which the king (concerning his justice) shall not be*

Digitized by Google

drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this; the king himself is de jure to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath.

"*And forasmuch, as this concerns the honor and conscience of the kings, there is great reason that the king himself shall take account of it, and no other.*"

But, even in England it has been solemnly determined, that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable court to Viner's abridgment, 14th vol. page 579. (F) pl. 3, and in notes, where he says,

"*A justice cannot rase a record, nor imbesil it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprision and he shall lose his office, and shall make fine for misprision.*" In the note "Brooke, Corone pl. 173 cites 2 R. 3. 9. 10. S. C. and P. and that he shall be *indicted*, and arraigned."

And to Hawkin's pleas of the crown, vol. 1st, chap. 69, sec. 6. where that author tells us

"*It is said, that at common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the 25th Ed. III. and at this day it certainly is a very high offence, and punishable, not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment, &c.*"

Mr. President, the principle I have endeavored to establish, is, that no judge or other officer can, under the constitution of the United States, be re-

Digitized by Google

moved from office but by impeachment and for the violation of *some law*, which violation must be, not simply a crime or misdemeanor, but a *high* crime or misdemeanor.

But an honorable manager (Mr. Rodney) who has this morning referred to some authorities, as to other parts of the case, has also contested the correctness of the foregoing principle, and has introduced the constitution of the state of Pennsylvania, by which he hath told us, a judge may by the governor be removed from office, without the commission of any offence, upon the vote of two thirds of the two Houses for his removal; notwithstanding that constitution hath a similar provision for removal by impeachment as hath the constitution of the United States. To this I answer, as we have no *such provision* in the constitution of the United States, the *reverse* is to be inferred, to wit, that the people of the United States, from whom the constitution emanated, did not intend their judges should be removed, however obnoxious they might be to *any part*, or to the *whole*, of the legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known, that the governor of Pennsylvania, hath not considered those words in the constitution of that state "that he *may* remove the judges on such address," as being *imperative*. For in a recent instance, where he did receive such address, instead of admitting the construction to be, as was contended, "*you must*" he determined it to be "*I will not*," and I have had the pleasure of seeing that judge, sometime since that transaction, on the bench with his brethren dispensing justice. I again repeat that as the framers of the constitution of the United States, did not insert in their constitution such clause as is inserted in the constitution of Penn-

Digitized by Google

sylvania, it is the strongest proof, that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us, that the tenure by which a judge holds his office, is good behaviour, therefore that he is removable for misbehaviour; and further, that misbehaviour and misdemeanor are synonymous and co-extensive. Here I perfectly agree with the honorable gentleman, and join issue with him. Misbehaviour and misdemeanor are words equally extensive and correlative; to misbehave or to misdemean is precisely the same; and, as I have shewn that to misdemean, or, in other words to be guilty of a misdemeanor, is a violation of some law punishable, so of course misbehaviour must be the violation of a similar law.

The same honorable gentleman has mentioned the impeachment and conviction of Judge Addison, and hath told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge;—that *this objection* was made with much energy on his defence, but that the Senate were convinced by the great talents and eloquence of Mr. Dallas, and some other gentleman, that the objection was groundless; they therefore convicted and removed him. I have not here the proceedings against Judge Addison, and therefore it *is possible* the Senate of Pennsylvania erected themselves into a court of honor to punish what they might consider breaches of politeness; but doth this honorable court sit here to take its precedents from the state of Pennsylvania or any other state, however respectable? I should rather hope that this honorable court should furnish precedents, which might be respected and adopted by

Digitized by Google

the different states. I would also ask, when was that precedent established? Was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and, that the senate of Pennsylvania overleaped their constitutional limits?—but if we are to go to Pennsylvania for a precedent, why should we not be guided by that, which the same state has so recently given us in a trial in which that gentleman bore so conspicuous a part? a precedent of *acquittal*; a precedent which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our constitution, as relates to the doctrine of impeachment. I, now, Mr. President, will proceed to the particular case before this honorable court, and in the first place I agree with the honorable managers, that there is a manifest difference even between the credibility of witnesses, and the credibility of testimony, for I admit, if witnesses are equally credible, and some swear that words were uttered, or acts were done, and others that they did not hear the words, or that they did not see the acts done, the presumption is certainly in favor of the positive, and against the negative testimony. But this must be admitted with considerable restrictions.

If, immediately after a transaction, there is a full and clear memory of the words spoken, or the acts done, there is great reason to credit the testimony; but even in that case, if there are a number of persons equally respectable, having equal opportunity to hear and see, and who were attentive to what took place, and none of them heard or saw, what is testified by a single witness, there

Digitized by Google

would be great reason to suspect the affirmative witness to be mistaken; more so if the transactions had happened for some years antecedent to the examination.

But, as to *Heath*, we do not contradict him *merely by negative testimony*; we contradict him by a series of positive facts which my honorable colleague (Mr. Key) has detailed, proved by characters, whose *veracity cannot be doubted*, which positive facts incontestibly shew that what he swore never could have taken place. And, here again, permit me, sir, to make a further observation; that, where a person is charged *criminally* for words he is supposed to have uttered, those words ought to be proved *with precision*. Every witness on *this* occasion, who hath been examined as to expressions used by my honorable client, either on the one or other charge, which are held as exceptionable, declares he cannot pretend to recollect the express words uttered by the judge, but only to state what at this distance of time, he can consider the amount of what was said. Nay, Messrs. Lewis and Dallas declare further, that they cannot pretend to say with accuracy, what part of the conversation, of which they give testimony, took place on the first or the second day, or in what order. Such kind of testimony, therefore, ought to be received with great caution, and not to be considered as conclusive. On this subject I will trouble this honorable court with a passage from M'Nally's treatise on evidence, page 518.

"It is no evidence in a criminal case, that the defendant said so and so, or in other words to the like effect, because the court must know the very words to judge of their force and effect. 2 Hawk. ca. 46.

"And the reason of this rule is, that of words spoken, there can be no tenor, that is transcript,

Digitized by Google

for there is no original to compare them with, as there is of words written: and though there have been attempts to plead a tenor of words spoken, it has never been allowed. And therefore if a plaintiff declares for words spoken, a variance, in the omission or addition of a word, is not material, and it is sufficient, if so many of the words be proved and found as are in themselves actionable. 12. Vin. abr. 68. pl. 46.

"So in Hussey *vs.* Cooke, Easter, 18. Jac. 1. in the Star-chamber. The court held, that if a witness depose that a defendant did persuade a juror to appear and to do him reasonable favor, or words to the like effect, this is no sufficient proof in criminals, because the court must know the very words to judge of their force and effect. Hob. 294. Fos. 200. 1 Hale, p. 6. 111. Kel. 14.

"Hale, Coke, and Foster, fully justify the principle of this rule. Foster says, as to mere words supposed to be treasonable, they differ widely from writings in point of real malignity, and proper evidence. They are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words to any act or design are not overt-acts of treason. Fost. 200.

"Keyling says, I see no difference between words reduced into writing and words spoken. Foster answers, the difference appeareth to me to be very great, and lieth here. Seditious writings are permanent things, and if published, they scatter the poison far and wide. They are acts of deliberation capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the court, naked

Digitized by Google

and undisguised as they come out of the author's hands. Words are transient and fleeting as the wind, the poison they scatter is at the worst confined to the narrow circle of a few hearers: they are frequently the effect of sudden transport, easily misunderstood and often misrepeated. Keyling 13. Fos. 200.

"The suppression of a word or syllable may change the sense; so the change of an emphasis. So words spoken in exclamation, conveying by sound and gesture surprise and abhorrence, may be represented in evidence as spoken blasphemously or seditiously."

Sir Michael Foster, a judge whose worth has seldom been equalled, perhaps never surpassed, and who has so correctly observed, that a *popular* judge, that is, one who in his decisions seeks after popularity, was one of the most contemptible beings in the world, is referred to as an authority.

This principle equally applies, where a person is charged *criminally* on account of words spoken, whether the offence is supposed to be treason, or only misdemeanor; the case referred to in Hobart, page 294, is an authority in point;—it is true, this case was determined in the *Star chamber*, but being determined in favor of the person accused, it becomes an higher authority—Star chamber cases are only complained of on account of their oppression.

I will now, Mr. President, proceed to consider the conduct of my honorable client on the trial of Fries, and to examine the law upon that case, and of course to investigate the rights of judges, in criminal cases, as well as the rights of attornies. I do not mean to go minutely into the testimony, which has been given in that case; but, taking it up on that given by Messrs. Lewis and Dallas, to

Digitized by Google

examine whether the court is to controul the counsel, or to be mere cyphers, destitute of authority to restrain and keep within bounds the lawyers when acting improperly. The whole of the practice, of which I have heard, during this trial, as being usual in the courts of Pennsylvania and Virginia, hath been to *me at least as novel* as the conduct of judge Chase appears to have been to the honorable managers. I, sir, have *always* considered it the province of the court in the course of a trial in *all* cases, whether civil or criminal, to declare what is the law. This right is admitted in civil cases, but, it seems, is denied in criminal. And therefore, it is contended, that in criminal cases counsel have a right to address the jury upon the law, and to urge them to determine the law in contradiction to the decision of the court. How doth the jury acquire the *power* of deciding the law in *any* case? Because, upon the general issue, having a right to give a general verdict, which involves both law and fact, the jury *incidentally* have the power to decide the law. But this doth not authorise them to give a verdict *contrary* to law. When a case comes before a jury, the court informs them what is the law if they believe the facts given in evidence; if they do believe the facts they are *bound in duty* to decide according to the law thus explained to them by the court. The decision *ought* to be the same as if the facts had been found by the jury in a special verdict, and the law left to the court. The jury, I admit, have the *power* to decide the law contrary to the direction of the court, but I deny that they have a *right* to do it. No person will deny that it is much more proper for the court to decide the law than that it should depend upon jurors, who in general are ignorant of the law. In civil cases, a jury sometimes give a verdict contrary to the direction of the court, but

Digitized by Google

the court correct this abuse of power by interposing and granting a new trial, thereby correcting the evils which would result from such abuse.

Let us then examine this question as to criminal cases. Is it not as important to society, that there should be uniform and fixed principles for the decision in criminal as in civil cases? Would it not be highly improper that one man should be convicted for a crime, and another who had committed the same, be acquitted, merely from the passions, prejudices or ignorance of jurors, influenced thereby to *decide* the law, differently in the different cases, though perfectly similar in criminality? No person can doubt on this subject.

Where then is the difference between civil and criminal cases? It is not that the jury have a *greater right* to decide the law in the *last* than in the *first*; but, that having the power to give a general verdict, which *incidentally* involves the law, they may give a verdict contrary to law, and contrary to the direction of the court; and the courts of justice, not having in criminal cases, through tenderness, enforced the remedy of a new trial, the abuse of power, thus practised in some cases by juries, have been uncorrected. No person can doubt, but that juries in criminal as well as in civil cases *ought* to give their verdict according to law, and, whenever they do not, they are answerable to their consciences and to their God, however they may be exempt from human punishment.

The *right* of the court to decide the law is the *same* in criminal as in civil cases. If there is a demurrer to an indictment, the court decides without the intervention of a jury. If there is a demurrer to evidence, the court decides the law—so if a special verdict is found, which may be found in a criminal, as well as in a civil suit.

Digitized by Google

The *power* of the jury, as I have before said, to decide against law, doth not give them the right, any more than the *power* of a person to knock down a man weaker than himself gives him the right so to do. And if juries in any case, knowingly give a verdict contrary to the law, instead of acting *impartially*, which is the duty of a jury, they act with *criminal partiality*.

So great is the difference of sentiment between the honorable managers, and some of the witnesses, who have been examined in this trial, and myself, upon the *right* of juries to decide the law in criminal cases, that in confirmation of my own sentiments, and to convince this honorable court I do not wish to impose upon them, I hope I shall be indulged in reading to them a very respectable authority upon this subject. It will be found in Co. Lit. 155, as follows:

"The most usual trial of matters of fact, is by twelve such men; for, *ad questionem facti non respondent judices;* and matters in law the judges ought to decide and discuss; for, *ad questionem juris non respondent juratores.*" Upon this is the following note:

"This *decantatum*, as Lord Chief Justice Vaughan calls it on account of its frequency in the books, about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy especially on prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence."

"In respect to my own ideas on this subject, says Mr. Hargrave, they are at present to this effect.

"On the one hand, as the jury may as often as they think fit, find a general verdict, I therefore think

Digitized by Google

it unquestionable, that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who writes, that if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally:

"But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.

"1st. If the parties litigating, agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury.

"2d. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury, for in that case the law is reserved for the decision of the court from which the issue of the fact comes, and the jury is either discharged, or at the utmost, only ascertains the damages.

"3d. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge who presides at the trial, to inform them what the law is; and, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster, the 2d. C. 31. make his exception in writing to the judges direction, and inforce its being made a part of the record, so as afterwards to found error upon it.

Digitized by Google

"4th. The jury is ever at liberty to give a special verdict, the nature of which is to find the fact at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Dowman's case, 9. Coke, 11. b. and the rule now holds both in criminal and civil cases without exception.

"5th. Whilst attaints, which still subsist in law were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprized of it by the judges, because if they mistook the law, they were in danger of an attaint.

"6th. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on judges, but they have a right to controul the verdict, and declare the law as they conceive it to be.

"7th. The courts have long exercised the power of granting new trials in civil cases where the jury find against that, which the judge trying the cause, or the court at large, holds to be law; or where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. Though too in criminal and penal cases, the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that *nemo bis punitur aut vexatur pro eodem dilecto*, or the hardship which would arise from allowing a person to be put twice in jeopardy for one offence, and if this be so, it only shews that on that account, an exception is made to a general rule. Upon the whole, as my mind is affected with this interesting subject the result is, that the immediate and direct right of

Digitized by Google

deciding upon questions of law, is entrusted to the judges; that in a jury it is only incidental; that in the exercise of this incidental right the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore, that in all points of law, arising on a trial, juries ought to shew the most respectful deference to the advice and recommendation of judges. In favour of this conclusion, the conduct of juries bears ample testimony; for to their honor it should be remembered, that the examples of their resisting the advice of a judge, in points of law, are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentations and ill practices of others. In civil cases, particularly where the title to real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and, though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a civil crime, is enabled by the general plea of not guilty, to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace, which exception, from the necessity of the times, is continually increasing, but which however cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of judge and jury seems to claim our utmost

Digitized by Google

respect. May this wise distribution of power between the two, long continue to flourish, unspoiled either by the proud encroachments of ill designing judges, or the *wild presumption of licentious juries.*"

In this prayer I most cordially join, and with the learned commentator, hope that this wise distribution of power may long continue to flourish unimpaired either by the proud encroachments of ill designing judges, or the wild presumption of licentious jurors. Such as I have here stated, I consider the principles of the English law, and to these principles I cheerfully subscribe.

But the principles adopted on this impeachment, and advocated, as I understand, by the honorable managers, appear to me to have a direct tendency to break down every barrier between the province of the court and the jury, giving every thing to the latter and nothing to the former; and so far from placing them or the counsel under the direction and controul of the court, prohibit the court from restraining either the jury or the counsel, under the danger of impeachment. I differ with them. If in any case the law is known to be settled by a uniformity of decisions, a court of justice *degrades* itself if it permits counsel to take up their time in arguing against it. If the question is not considered as fully settled, counsel certainly ought to be heard, but it is to the court they ought to address themselves. In England the first lawyers who have ever existed, have not thought themselves degraded by arguing the law in criminal as well as in civil cases, before the court. If counsel should attempt to impose on the jury what is not law, is the court to sit tamely by, and suffer them to proceed? Such has not been the practice in the courts which I have attended. Where the law is known to be settled, or where, upon application to the

Digitized by Google

court, a determination is given, the counsel must go before the jury upon the fact, and endeavor to distinguish his case, and shew that it doth not come within the law as established; for should counsel attempt to state any thing to the jury, which appears designed to controvert the law as declared, they are immediately stopped by the court, and to persist would be considered highly indecorous, nor would the court permit it to be done. In Maryland the lawyers do not claim as a constitutional right, to mislead and deceive the judges, much less mislead and deceive the jurors, free from any controul of the court.

But it has been said that juries are most proper to decide the law in criminal cases, thereby to prevent a criminal from being borne down and oppressed by the weight of the prosecuting power. What case can arise in this country, to which this argument can apply? In England, before the revolution, while judges were dependant on the crown, if also wicked and corrupt, there might, where government was interested, be some such cases. But is our situation to be compared to that of England, at that time? If so, it was not worth while for us to have taken upon ourselves the risks of the late revolution to have changed our government.

Is there any thing to induce judges to oppress any individual even though offensive to government, while they are *independent?* Any danger of that kind is to be apprehended from judges who are *dependent.*

And hence flowed the great constitutional provision, which secures the independence of the judges, which secures them from being removed or punished while they discharge their duty.

What probability is there that a judge would do injustice to any person with a view to please any

Digitized by Google

party, when he could have but *very little prospect of reward*, and would be sure that though he did his duty he could not be removed from office or exposed to injury?

I wish this honorable court to reflect on the nature of man. In a government like ours, there will always be majorities and minorities. Minorities will often be powerful, and frequently in due time become majorities: If a judge should do an act pleasing to the majority, he must know it may render him hateful to the minority, who in course of events, may get the power in their hands. If he endeavors to ingratiate himself with the minority, he exposes himself to the displeasure of the ruling majority. *It is the duty of a judge to enforce the laws, while they exist, however unpopular those laws may be to any portion of the community.* If he enforces such laws, he will gain the approbation of one party, but he will as certainly be disapproved by the other. Would you then wish that your judges should be exposed to be removed from office because, by the *most honest conduct*, they had displeased one party or the other, and leave them at the mercy of those who should from time to time, hold the power of government in their own hands? No, it is the *sacred independence* of the judiciary, and that *alone*, which can be the best security that the judges shall not act with oppression.

But let me ask further, are juries more free from undue influence than judges? Have they greater inducements to do what is right? They do not possess the elevated situation of the judges, they feel not the same responsibility; whatever may be the impropriety of their conduct, it would probably be scarcely heard of out of their own neighborhood, not long even there. They are liable to all the political prejudices of men devoted to the different parties which may exist. They are generally men

Digitized by Google

totally ignorant of the law; nay, I shall prove when I come to speak of Basset's case, that though the managers contend the jury should decide the law, yet ignorance of the law is by them considered the first recommendation of, nay, a necessary requisite for a juror!

Can it then be wise to reduce a judge to the humiliating situation of having the law decided by such a body, exposed to be led into error by the ingenuity of counsel? Can it be the wish of this court to trust their property, their lives, all that is most dear to them, *even as to legal questions*, to the *wild ideas* of jurors, liable to all the frailties of human nature, in preference to the sound discretion of judges well skilled in the law, and holding a high and responsible station?

Having laid down these general principles as to the relative rights and duties of the court, the bar, and the jury, I shall proceed with my honorable client to the state of Pennsylvania.

It was known that John Fries, charged with treason, had, on a former trial, been found guilty, and that a new trial had been granted upon a suggestion, which I hope will not become a precedent —will never be a rule for decisions. When I say this, I mean not to detract from the merit of that highly respectable character who presided, and who granted the new trial. His conduct flowed, I am convinced, from his humanity; his was the error of the heart, not of the head. It was an honest, nay an amiable error. My honorable client knew, when he arrived at Philadelphia, that the trial of Fries was to take place that term. He has been acknowledged by the honorable managers, to be a gentleman of the highest legal talents. In this they have only done him justice; and have been as prodigal of their praise as his warmest friends could have wished. It would have given

Digitized by Google

me great pleasure if they had been as *just* in expressing their sense of his integrity. He had been in the practice of the law for forty years, and also a judge for a number of years, and for about six years I believe, presided in the criminal court of Baltimore county, where, during that time, there were more criminal trials probably than in any other court in America. I believe I speak moderately, when I say that I have attended on behalf of the state, at least five thousand criminal trials in that court. From those circumstances it is to be presumed that he was not deficient in knowledge of what related to criminal proceedings, but would he have acted the part of an upright judge, if he had not endeavored to make himself master of the law of treason, when a case of that nature was about to come before him; particularly the law of treason, as it related to levying war against the United States, or in adhering to those who levied war against them, which is the only kind of treason that our constitution acknowledges; although I have heard I must own, of *treason* against the *principles* of the constitution, and *treason* against the *sovereignty* of the people, words well enough suited to a popular harangue, or a news-paper essay, but not for a court of justice.

When judge Chase arrived at Philadelphia he had the advantage of perusing the notes of judge Peters and the district attorney, relating to the former trial; he thereby became well acquainted with all the points at that time made by the counsel for Fries; and Mr. Lewis has sworn, that all the points which were intended to have been made before judge Chase, had been made at the former trial. Why then should the court either wish, or be obliged to hear counsel again on the law? In two previous cases the law had been settled. Judge Paterson, a gentleman of the first abilities, mild

Digitized by Google

and amiable, whom no person will charge with being of a vindictive oppressive disposition, and who certainly has more suavity of manners than my honorable client had, after a most patient and full hearing, where eminent counsel attended, decided the law as was decided by the respondent. Judge Iredell, whose encomium has been most justly given us by the managers, a gentleman of great legal talents, than whom no worthier man has left this for a better world; and who, while living, honored me with his friendship, after having heard Messrs. Lewis and Dallas, and after full and patient investigation, gave, in the case of Fries himself, a similar decision; in both which opinions judge Peters perfectly coincided. Under these circumstances, judge Chase, who had no doubt of the propriety of those decisions, to prevent waste of time when there was so much business to transact, and to facilitate the business, thought it best to inform the counsel on each side, that the court considered the law to be settled, and in what manner. For which purpose they delivered to the clerk three copies of their opinion, one for the counsel on each side, the third to be given to the jury, when they left the bar. On this subject, Mr. Lewis, in his testimony, said it was to be given to the jury when the counsel for the United States had opened, or after he had closed the pleadings, but he believed the *last*. Mr. Rawle is clear that it was to be given to them, when the case was finished, to take out with them.

No gentleman on behalf of the impeachment has denied the correctness of this opinion. But the criminality of the judge, is, we are told, not in the opinion itself, but in the *manner* and the *time* in which it was given.

Was there any thing improper that the opinion should be reduced to *writing?* Why are opi-

Digitized by Google

nions given? Surely to regulate the conduct of those to whom given; for this purpose they ought to be perfectly understood, and in no degree subject to misconception; delivering the opinion, *in writing*, greatly facilitates these objects; if therefore it was *proper* to give an opinion, it was *meritorious* to reduce it to writing, and judge Chase, in so doing, most certainly acted with the strictest propriety. And, unless a court of justice is bound to sit and hear counsel on points of law, where they themselves have no doubts, before they give their opinion, my honorable client could not be incorrect in delivering it at the time when it was delivered. If the opinion was *proper*, how, I pray, could any *injury* be done to Fries by its being delivered? The honorable managers say, it was intended to influence the jury. In the first place, this assertion is not supported by the evidence. When the paper was thrown on the clerk's table, not one word was said of its contents; nor did the court declare any opinion on Fries's case. They only determined the indictment correct in point of form, and not liable to be quashed. They determined that the overt acts stated were overt acts of treason, if Fries had committed them, but whether Fries had committed those acts remained for the jury to determine upon the evidence; as to that part of the case the court gave no opinion. But the honorable managers have told us that Judge Chase must have known what were the facts in the case, because they had been disclosed in the former trial. And I pray you, sir, if he had that knowledge, could it *alter the law in the case*, or render the declaration of what the law was, *more improper?* But, as a new trial was granted, the judge could not know what additional evidence might be brought forward to vary the case from its former appearance.

Digitized by Google

Nor *did*, sir, the judge's conduct, either improperly influence, nor was it intended so to influence, the jury. No copy of the opinion would have been taken but for the conduct of Mr. Lewis, and no testimony has been offered to shew the least probability, that one single jury man ever saw the copy, or knew one word of its contents. Nay, sir, it is proved, that judge Chase took *uncommon* pains to prevent any of the jurors from being prejudiced against Fries; for, although a great number of criminals indicted for sedition, submitted to the court before Fries was put upon his trial, the judge would not permit *one single witness*, who was summoned against Fries, to be examined on the submissions, least the jury, by an examination, which would have been, as to Fries, *ex parte*, might take up prejudices against him. This, Mr. President, was an act of the judge that carries with it the most convincing proof, that he had *no wish to oppress Fries, or to prevent him from having an impartial trial: and I pray that this circumstance may be deeply impressed on the mind of every member of this honorable court.*

But if the opinion had been publicly read and known, how could it have *injured* Fries? He was to have an *impartial* trial. What is the meaning of these expressions? It is a trial according to law and fact, in which, if he is proved innocent, he shall be acquitted; if guilty, convicted. If then the opinion was agreeable to law, it could not prevent, it could not interfere with his having an impartial trial. If in any case a person is acquitted, when the facts are clearly proved, and the law is against him, it must be because he has had a *partial*, not an *impartial trial.*

I again ask, sir, ought the court, who were perfectly satisfied with respect to the law, and who considered it settled by previous decisions, in

Digitized by Google

which they perfectly concurred, to have wasted perhaps several days of the public time before they gave their opinion, in listening to Messrs. Lewis and Dallas, exerting all the powers of eloquence and of sophistry to mislead their judgment? Nor did even judge Chase give *his* opinion without the full consideration of the arguments of each of these gentlemen, in the very case of Fries. On his arrival, it is admitted by the managers, that he became perfectly acquainted with the proceedings in the former trial, as to the legal questions which had occurred, from the notes of judge Peters and of the district attorney; and this honorable court have had an opportunity of witnessing with what precision that gentleman takes down the substance of proceedings on a trial. Judge Chase had an opportunity of examining and considering the arguments used by Messrs. Lewis and Dallas, at the former trial, on the different legal questions then brought forward, the authorities produced, and the applicability of those authorities. He there saw every thing that the great legal knowledge and high talents of those gentlemen, indulged to the utmost extent, and heard with the greatest patience, had produced in favor of Fries. And he had the opportunity of calmly and deliberately considering the whole of these arguments and authorities in his chamber. And having done this, where would be the propriety of spending day after day in listening to the same arguments orally repeated in court, which he had read in his closet, the merit of which he had there coolly discussed, and deliberately decided?

But the managers say that this *ought* to have been done. That, though the court had no doubt of the law; and, although it is not contended but that the opinion given is correct, yet it was the *duty* of the court to have patiently listened to the coun-

Digitized by Google

sel, and suffered them to exert all their eloquence, their ingenuity and sophistry, to pervert their judgment, and lead them into error, to prevail over their understanding, and obtain from them an erroneous opinion. And yet in the same breath, we are told by one of the honorable mangers, (Mr. Campbell) that if a judge gives an erroneous opinion, the presumption is that he doth it from corrupt and criminal motives; and that on impeachment, it is necessary that he should prove the uprightness and integrity of his intentions.

Thus, then, they insist, that if a judge, intelligent, sensible, well acquainted with the law, doth not indulge counsel in their attempt to lead him into error, he is to be impeached for it. And, if the judge should listen to counsel against his well formed opinion, and by their ingenuity be led to give up his better judgment, and pronounce an erroneous opinion, he is to be impeached for that also!

Nay, it is expressly said, that the more completely the law is considered to be settled, the more absolutely necessary it is that the criminal's counsel should be permitted to argue the law to the court, and to contend against the law so settled. Thus, then, I suppose, if a person is tried for an assault and battery, the prisoner's counsel must be indulged by the court, and that under pain of impeachment, in spending as much time as they please, in endeavoring to convince the court, that to come up behind an innocent inoffensive man, and fracture his scull with a bludgeon, doth not amount to an assault and battery;—or, if a person is tried for a burglary, his counsel must also, under the same penalty, be indulged in the endeavor to convince the court, that to break into a dwelling-house in the night time, and steal therefrom is not the offence of burglary.

Digitized by Google

But the honorable managers do not stop even here. They say, that even had judge Chase indulged the counsel of Fries with all the length of time they might think proper, in an endeavor to pervert the judgment of the court, and their endeavor had proved unsuccessful, the court was further under pain of impeachment, after they had correctly declared the law to the jury, to suffer the counsel to take up as much more time as they pleased, in endeavoring to mislead the jury, by impudently and insolently, in the face of the court, attempting to impress them with the idea that the court, though acting under a solemn oath, and having no interest to mislead them, had given an erroneous opinion; and, to induce them to receive the law from the counsel themselves, acting not under similar obligations, but whose fame and whose fortunes might be materially benefitted by deceiving the jury,—from counsel whose every interest might be to pervert justice.

All which indulgence, the court, it seems, is also equally bound to give to the counsel in endeavoring to mislead the jury, and pervert justice, in the cases I have before mentioned of assault and battery, or burglary, or in reality, of any other offence, however incontestible the principles of law in such cases may be. Such are the constitutional rights, which criminals and their counsel, we are told, possess; the constitutional right, if possible, to impose upon the court; and, if they fail there, the constitutional right to impose upon the jury; in other words, the constitutional right to *pervert* justice!

Nay, we are told the more manifest the guilt, the more indisputably criminal the offender is, the more necessary that he should enjoy these constitutional rights; and so it would be, if the constitution intended, as seems to be the idea of the ma-

Digitized by Google

nagers, that guilt should go unpunished; since such offenders can have no chance to escape, unless justice be perverted, through the ingenuity of counsel operating upon the ignorance, the passions or the prejudices of judges, or jurors.

The managers have, consistent with the above idea, which they seem to have adopted, exclaimed, "what good could counsel do to Fries, after the court had decided the law? As to the facts there were no dispute. Under such circumstances, to assign counsel to him, was mockery, was insult."

In reply, I will admit, that Fries's case was such, that counsel could not render him much service, but this was not the fault of the court, it was the fault of the case itself, it was because the law was clearly against him, and because the evidence indisputably proved, that he had committed acts, which brought him within the law.

In such cases, what is the duty of the counsel, whether assigned by the court, or employed by the prisoner?. It is to advise the prisoner to plead guilty, and throw himself upon the mercy of his country, instead of taking up the time of the court, and creating expence by a jury trial; but such advice, however agreeable to the constitution of our country, would not, I admit, agree very well with the constitution of a lawyer, as thereby he might occasionally lose large fees extorted from a criminal, fed on the vain hope that the eloquence and chicanery of his lawyer might procure his acquittal contrary to law, and contrary to evidence.

But counsel *may be* of service to a criminal however guilty he may be, and has duties which he may correctly perform; the counsel may with propriety avail themselves of any defect in the indictment or other proceedings; they may take care that the pannel of jurors are legally and impartially return-

Digitized by Google

ed; they may direct the prisoner as to his challenges to jurors; they may take care that no incompetent witnesses are sworn, and that no improper testimony is given; they may in any questions of law, not considered settled, be heard, and have the questions decided; in fine, they may take care that the prisoner has a *fair trial*; but when all this has been done, if agreeably to law, and clear undoubted evidence, the prisoner is guilty, it is the duty of the counsel to submit his client's case to the honest decision of the jury, without any attempt to mislead them; and this, whether the counsel are appointed by the court or employed by the criminal. Thus lawyers in Maryland are in the habit of conducting themselves in such cases, and thus ought lawyers, who respect themselves, and have a regard for their own characters, to conduct themselves in all places.

I have heard so much, Mr. President, in this case, about the constitutional rights of criminals to have counsel; and that the counsel should argue to the jury upon the true construction of the law, against the direction of the court; and, that the jury have the right to decide the law without regard to such direction; and finding also, that this article of impeachment, as well as the arguments in support of it, appear to be grounded on these principles, that I have been almost induced to suppose I had mis-read the eighth amended article of the constitution, but on turning to it, I find that the constitution secures to the criminal the assistance of counsel, to see that his trial is fairly and correctly conducted, but has not given to the person charged with an offence, or to his counsel, if he is guilty, any constitutional rights, for the purpose of his evading punishment by the imposition of counsel, either on the court or the jury.

Digitized by Google

Whatever may have been the *practice*, I have ever considered it contrary to the *duty* of counsel, either in civil or criminal cases, to exert their abilities in attempting to procure a decision, which they are conscious is unjust. The duty of a lawyer is most certainly, in every case, to exert himself in procuring justice to be done to his client, but not to support him in injustice.

Having made these observations on the relative duties of the court and counsel, let me advert a moment to the conduct of Mr. Lewis, as appears from his own testimony. When my honorable client delivered at the clerk's table, the copy of the opinion designed for the defendant's counsel, having taken it in his hand—without opening it—without reading one word—Mr. Lewis contemptuously threw it from him, publicly declaring, that "he would never contaminate *his hand* by receiving into it a *prejudicated opinion*, in any cause where he was concerned, from any judge whatever." What insolence! Would to God, no lawyer may ever *contaminate his hand* in a more *disgraceful* manner, than by receiving therein a sensible, correct, legal opinion, in a cause about to be tried, at whatever time it may be delivered to him!

He also informs us, that he declared to the court, that he never had, nor ever would so far degrade himself as a lawyer, as to argue a question of law, in a criminal case, before the court.—What arrogance! Sir, the most eminent, the most respectable lawyers both in England and America, have been in the constant habit, not only of arguing questions of law in criminal cases before the court, but in modestly submitting to their decisions, without ever considering it as lessening their consequence. I have long been at a loss, sir, for the enmity the state of Pennsylvania has

Digitized by Google

shewn for its bar, and the desire of its citizens to get rid of their lawyers; but if such is the manner, in which the lawyers conduct themselves to their courts—if they, when they are employed in a cause, claim the constitutional right, uncontrolled by the court, instead of furthering justice, to pervert it; I wonder no longer why the citizens of that state wish to be freed from them; and will readily join in the sentiment, "the sooner the better." I will go further, and say, if their courts submit to such conduct, and think themselves bound to be the *passive* witnesses of such perversion of justice, it is not much matter how soon they also get rid of their courts, for they might as well be without them.

The principles which have been advocated in support of this article, are subversive of the whole order of things; instead of lawyers being the officers of the court, subject to their control, and amenable for the propriety of their conduct; the judges must be the menial, degraded instruments of the lawyers, and must suit their conduct, not to propriety and justice, but to the pleasure of any haughty overbearing lawyer, possessing abilities and popularity, and that too under the hazard of being impeached and turned out of office, if his principles should, on any occasion, render him restive, or, in the language of the testimony, if he should "take the stud."

And here, Mr. President, I hope I shall be indulged with some enquiry as to this "prejudicated opinion;" *which* Mr. Lewis seems to think has such a contaminating, polluting tendency to the hand of a lawyer, and of which he was so apprehensive, that he would not retain it for a moment. I confess, I feel myself here at a loss to know exactly what the witness meant by a "*prejudicated opinion*" on the law. I should suppose that the

Digitized by Google

expression, if it can in any instance be correctly applied, must mean the same as to prejudge the law; which, if used to signify any thing improper, must be confined to the case where a person forms an *erroneous* opinion of the law, without using *all due means* to acquire correct information.

To *prejudge* any case, I consider as meaning, that a person without competent knowledge of facts, hath formed an opinion injurious to the merits of the case. If the term prejudication is used in this sense, there is no pretence that my honorable client gave a *prejudicated* opinion in the case of Fries; for it is not alledged that the opinion given was not strictly legal and correct. Neither Mr. Lewis nor Mr. Dallas have ever attempted to hazard their characters by suggesting the contrary, nor have the honorable managers taken that ground; they do not contest its propriety. Should they in their reply, I shall cheerfully rest that question upon the well known legal abilities of judge Iredell, Paterson, my honorable client, the associate judges, who concurred with them, and the legal knowledge of this honorable court.

But if by a prejudicated opinion, is meant, that the judge, from his great legal knowledge, and familiar acquaintance with the law, as relative to the doctrine of treason, particularly levying war against the United States, had formed a clear decided opinion that the facts stated in the indictment against Fries, if proved, as laid, amounted to treason, I will readily allow that I have no doubt my honorable client had *thus* prejudicated the law, not only before Fries was brought to trial, but before he had committed the treason for which he was tried. But if this manner of prejudicating law is thought improper, nay, criminal, in a judge, a prejudication, which is nothing more than an eminent and correct knowledge of the law, why I pray are gen-

Digitized by Google

tlemen of great talents, and high legal attainments, sought for in your appointments of judges? How, sir, are they to free themselves from this obnoxious prejudication of the law, and acquire the contended fitness for the trial of a cause, but by forgetting all that legal knowledge, which had been a principal inducement to their appointment? If I understand the gentlemen, to gratify their ideas, we ought to have judges, who, when they take their seats on the bench to preside at the trial of a criminal, should not have one single legal idea relative to the offence about to be tried, but should have their minds exactly in that state, in which, some ingenious metaphysicians tell us, the human soul is when first united to the body, like a pure unsullied sheet of white paper, ready to receive any impressions which may be made upon it.

Well, be it so, and let us consider the trial of Fries as if it had been conducted on that principle. The judges, with their minds like this white sheet of paper, were to sit still, and suffer the counsel to scrawl thereon whatever characters they pleased, —to blot and to blurr it, until they were perfectly satisfied. After this ceremony, the judges, examining the impressions thus made upon the antecedent clean sheet, were from these, and these *only*, to form their opinion of the law. And this opinion, having been thus formed from nothing but what occurred *during* the trial, and *after* the jury were sworn, would not be called a prejudicated opinion, and therefore I presume would be perfectly satisfactory to the honorable managers. So far we should have done very well as it related to the trial of Fries. But next day another criminal is to be tried for a *similar* offence; Messrs. Lewis and Dallas are not his defenders. Getman has selected Mr. Tilghman for his counsel. How, I pray you, are the judges to be qualified to preside

Digitized by Google

with propriety in this trial? Yesterday they gave a solemn determination in Fries's case upon the *same* question of law which now must come forward in the case of Getman. Mr. Tilghman was not then heard. The opinion, then given, is, as *to Mr. Tilghman and his client*, as much a prejudicated opinion, an opinion as contaminating to the hand of a lawyer to receive, and as highly criminal for a court to give, as was the opinion given by my honorable client. What can be done? The minds of the judges are *no longer a pure unsullied sheet of paper*. Yesterday, in the trial of Fries, they had been scrawled upon and sullied by Lewis and Dallas; the impressions still remain. I, sir, can think of no remedy in this difficulty, except that the judges should be supplied with a reasonable quantity of *India rubber*, or something which shall answer in its place, with which they might wipe off and erase every impression which had been made the day before by Lewis and Dallas, during the trial of Fries. And thus *once more* take their seats on the bench for the trial of Getman, with minds again like clean sheets of white paper, ready to be again scrawled over, again to be blotted and blurred, at the pleasure of Mr. Tilghman, and from these scrawls, blots and blurrs, and from these *alone*, to take their impressions as to the law, and form their decision as to Getman's case, without regarding, or even *remembering* the decision they had given the day before. And in this manner to proceed in every case that might come before them successively in their judicial capacity!

If, sir, judges are to be censured for possessing legal talents, for being correctly acquainted with the law in criminal cases, and for not suffering themselves to be insulted, and the public time wasted, by being obliged to hear arguments of

Digitized by Google

counsel upon questions which have been repeatedly decided, and on which they have no doubt; I pray you let not our courts of justice be disgraced, nor gentlemen of legal talents and abilities be degraded by placing them on the bench under such humiliating circumstances! But let us go to the corn fields, to the tobacco plantations, and there take our judges from the plough, and the hoe. We shall there find men enough possessed of what seems to be thought the first requisite of a judge, a total ignorance of the law! That degradation, which *no gentleman* of merit and abilities *could endure, they will not feel.*

In reply to an observation made by my very respectable colleague who opened our defence, and which I have endeavored to enforce, "that, if the opinion given by the court was correct, Fries could receive no injury thereby, though Messrs. Lewis and Dallas had not been suffered to argue against that opinion, because the opinion ought, notwithstanding, to have been the same, one of the honorable managers hath said, that had judge Chase sentenced Fries to death without the verdict of a jury; had he decided the fact as well as the law; and he says he might have done the one with as much propriety as the other, it might have been urged in the same manner in defence of the judge, "that it was of no consequence to Fries, for the fact being clearly against him, had he been tried by a jury, the jury must have found him guilty, and then the judge must have done what he did, sentence him to death."

This argument is totally fallacious. By the constitution and the laws of the United States, the criminal has a right to demand that the *facts* shall be decided by a jury. This the court cannot refuse if the criminal requires it. Was a judge to refuse the criminal the trial of the fact by a jury, he would

Digitized by Google

violate a well known legal and constitutional right of the criminal. But as the criminal has a right that the jury should determine questions of fact, so do the principles of jurisprudence equally declare it to be the right of the court to decide questions of law; and the constitution in no part, contravenes this right; it no where says that the judges must be ignorant of the law, and take their impressions from the counsel of the criminal, or that it is the right of counsel to be heard where the court has no doubt of the law, or to argue to the jury that the law is contrary to the direction of the court, or that the jury should have a right to decide the law contrary to such direction. Hence, therefore, there is this great distinction between the two cases; in the first the court only exercise their own rights, infringing no right of the criminal; while in the last, the court would act in direct violation of his well known legal and constitutional rights. But though the criminal has the constitutional right to have *all facts* decided by a jury, he may wave this right, in which case the court may pass sentence without the intervention of a jury, as where the criminal demurs to the indictment, and rests upon his demurrer, or where he pleads guilty, in which cases, the court, without the intervention of a jury, proceed to pass sentence according to law, and the nature of the offence.

In the opening of our defence, it has also been urged, that if there was any impropriety in the conduct of the court, respecting the trial of Fries, on the first day, it was amply compensated by the conduct of the court on the second day, in having called in the written opinions, and the copies which had been taken, and given the counsel liberty to proceed in such manner as they should think proper.

Digitized by Google

In answer to this the honorable managers have replied, that it was then too late. The mischief, that had been done the first day, was irretrievable; the sin, that day committed, was inexpiable: Nay, one of the managers has told us, that the excuse is as absurd, as would be the excuse of a person, who, having thrown a firebrand into combustibles, and set the whole neighbourhood in a blaze, should attempt to excuse himself by saying "he had again got into his possession, and extinguished the brand, with which he had enkindled the fire, although the conflagration was still extending, and consuming every thing before it;"—a most happy simile.

But let us examine wherein was the mischief so irretrievable—the sin so inexpiable? neither more nor less, than in this, that as the written opinion only contained the impressions on the minds of the judges, the destruction of that written opinion would not prevent the same impressions remaining on their minds; and those impressions would be as difficult to remove, after the opinions were called in, as before. It is all very true; but how came the judges to have on their minds those impressions? Not from having committed them to paper, but from their correct knowledge of the law. And how were those impressions to be removed? Certainly by no means, unless that correct knowledge of the law could also be removed. To accomplish which, I know of no means that could be used, unless the judges could have been supplied with a quantity of our *India rubber*, or with a few barrels of the waters of Lethe, with the one to rub out and efface from their minds all their legal knowledge, or by copious drafts of the other, to wash it away. But, sir, I have not made, nor shall I make any use of the proceedings of the second day as an excuse for any impropriety of the court

Digitized by Google

on the first; I only consider them as incontestible proofs, that the court had no other object in view, on either of those days, than conscientiously to discharge their duty, by giving Fries a fair and impartial trial, that if he was guilty he might be punished—if innocent, acquitted. I deny that the court was guilty on the first day, of any impropriety; I take higher ground, and have contended, and do contend, that the conduct of the court on the first day, was correct and proper, and during the whole trial I find nothing improper in their conduct, except their almost humiliatingly soliciting the counsel of Fries to do their duty, instead of committing them to gaol for the impropriety of their conduct, which the court ought to have done; but even in this, the court has afforded the strongest proof of their solicitude that Fries should have every legal and constitutional benefit of counsel at his trial.

Reflect, also, that at the time when Mr. Lewis thus contemptuously dashed from his *pure hand* the *contaminating* opinion, he had not read a single word, nor received the least intimation of its contents, nor did he know its contents until long after; and yet he instantly formed the determination not to appear for Fries, and to advise their client not to accept the assignment of any other counsel, should the court offer it. Whence this conduct? How did he know the opinion was not favorable to his client? His conscience told him it was not. His own great legal knowledge confirmed to him the truth. He well knew the law; he was acquainted with the correct decisions which had been before given. He well knew the great legal knowledge of the judge, who on this occasion presided; he was certain my honorable client could not but concur with his brethren. He ac-

Digitized by Google

knowledges they had no hope to change the opinion of the court, and that they had not the vanity to suppose the jury would, under their influence, decide the law contrary to what the court should direct; therefore that they had no hopes of the acquittal of their client by the jury on the trial, whatever services they were permitted to render him; and therefore, as the only chance, which they had to save his forfeit life, they assumed that line of conduct, which has been disclosed in the evidence. When Mr. Lewis, in giving his testimony, mentioned, "judge Peters asked us on the next day whether if the court had got into a scrape the first day, the counsel would not let the court get out of it." "No," said Mr. Lewis, "we were determined not to let them get out of it, as the only means to save our client's life," and in the conclusion of his testimony, he repeated that they were actuated in their conduct, from considering it the only chance they had to save the life of their client, and not from any other motive. And Mr. Dallas also observed in his testimony, that when the court, on the second day pressed them to continue their services as counsel of Fries they refused, determined not to depart from the policy they had adopted, and to withdraw, as the most probable means of benefiting their client.

I shall conclude what relates to this article by observing, that the conduct of Fries's counsel to the court, on that trial, was such as nothing can excuse. It can only be palliated by the reflection that for his crimes he was liable to suffer death. Feelings of humanity and compassion, independent of interest, might excite in their bosoms an earnest anxiety to save his life, this may serve to mitigate censure; but even those feelings, however amiable, ought not to be gratified at the expence of national justice, nor by an endeavor to

Digitized by Google

stamp upon judges of uprightness and integrity the dishonorable charge of partiality and oppression. I fear, sir, I have been tedious on this article; but it will be considered that, whatever may be my own sentiments of the futility of any part of these charges, I cannot determine how far this honorable court may correspond with me in sentiment. Nor can I do otherwise than treat, as of consequence, any charge brought forward by the honorable House of Representatives, or not consider it as being of importance.

I will now, Mr. President, proceed to those articles which arise out of the trial in Virginia; and I find it stated in the beginning of the second article, that my honorable client went there prompted by the *same* shameful spirit of persecution and injustice; the truth of which I am ready to acknowledge, after having satisfactorily proved that at Philadelphia he had not shewn in any manner whatever a spirit of persecution and injustice, but had acted with uprightness and integrity; and that his greatest fault on that occasion was, that he did not commit the counsel of Fries to the public gaol for their insolent, their arrogant, their contemptuous behaviour to the court: and I flatter myself that I shall be able to shew that my honorable client acted with the same uprightness and integrity in the case of Callender as I have shewn he acted in the case of Fries.

The second article goes on to charge judge Chase with over-ruling the objection of John Basset, who wished to be excused from serving on the jury in the trial of Callender, and causing him to be sworn, and to serve on the said jury, by whose verdict Callender was convicted.

This article requires a discussion of the law relating to challenges of jurors—and whether Mr. Basset was legally sworn on that jury. —And here

Digitized by Google

again as well as in the case of Fries, I meet with the most perfect novelties, for except in those trials I never heard of jurors, when called to be sworn, examined on oath whether they had formed;—or formed or delivered, or whether they had formed and delivered an opinion on the subject about to be tried.—And here also let me observe that there is no just grounds for the charge that judge Chase from partiality administered the oath differently in Callender's case from the manner in which he administered it to the jurors in the case of Fries, for Mr. Rawle, referring to his notes taken at the time, hath told us that in the case of Fries, one or two of the first jurors were only asked whether he had formed an opinion; after which the question was put, whether he had formed *or* delivered an opinion, but ultimately the question asked was, whether they had formed *and* delivered an opinion, which question was put to the greater part of the jurors; so that the interrogatory *ultimately* fixed upon in the case of Fries is the same which was put to all the jurors, who were interrogated in the case of Callender.

I have, Mr. President, been in the practice of the law for thirty years.—Before the revolution I attended, two or three years, the two counties on the Eastern Shore of Virginia—Sussex county in Delaware—and Somerset and Worcester in Maryland; since the revolution I have constantly attended the general courts on the Western and Eastern Shores of Maryland, and the civil and criminal courts of Baltimore county—and for about six years several other counties in Maryland.—In the whole course of my practice, I have never known a single case either civil or criminal, in which the jurors have been, when called to the book, demanded to answer upon oath either of the aforesaid

Digitized by Google

questions, which the defendant's counsel requested to be put to them.

If either party choose to challenge a juror for favor, on account of declarations made by the juror, the only ground for it is that he has used expressions shewing his determination to decide for one party or the other without regard to truth and justice. In which case the party makes his objection to the particular juror, specifying the expressions uttered by the juror indicative of such improper determination, and produces witnesses to establish his objection; for the juror cannot be examined on oath to substantiate the charge—and, unless by mutual consent, the objection made must be decided, not by the court, but by *Triers*. And the only matter to be decided is whether the juror has made any declaration of a design to give a verdict one way or the other, whether right or wrong; for if the juror made the declarations from his knowledge of the facts in the case, this would be no cause of challenge, nor any objection to his being sworn on the jury. And as the juror himself against whom such objection is made cannot be examined on oath, it follows of course he cannot be challenged for having *formed* an opinion, but only for having *delivered* it, as *third* persons cannot know of an opinion being formed but by its having been delivered. And as I have observed already, even the delivery of an opinion is no cause of challenge, if it appears to have been founded upon the jurors knowledge of facts, and not from partiality—in consequence of this principle of law, it can be no objection against a juror being sworn, even though he should have the most perfect knowledge of every fact relative to the issue, to try which he is about to be sworn;—on the contrary, the principal reason assigned why trials ought to be by jurors from the *vicinage* is the presumption

Digitized by Google

that they will be best acquainted with the facts which will be put in issue for their decision.

Suppose a person, summoned as a juror to try an indictment for assault and battery, or any other offence, had seen the offence committed and perfectly knew the offender, it would be no cause of challenge against the juror, nor could he for that reason be rejected at the trial—on the contrary the law considers him the better qualified to serve in that case as a juror in consequence of that knowledge. If in the instance I have put, such juryman had declared that the criminal had committed an assault and battery, and that he was determined to find him guilty, this declaration being founded on the knowledge of the juror as to the truth of the case would be no ground for challenge—to support a challenge, the juror must shew an intention to act partially through favor or malice. It is therefore no objection to a person serving as a juror because he is also a witness.

And so far is it from being the case that a juryman's knowledge of the law, or his having declared his opinion of the law arising in the case to be tried, should be a cause of challenge, that, if two or more persons are indicted in the same indictment for the same offence, and one is tried and convicted, a juryman, who served on that trial may be sworn on the subsequent trial of the other person joined in the indictment, and cannot be challenged, although as to the law arising in the case he had not only declared his opinion, but even declared it on oath in the former trial. So also, is the case of a judge, whether he is to decide the law only, as in jury trials, or the law and fact both, as here in the case of impeachments;—his knowledge of the facts in the cause is no objection to his acting as a judge, and he may be called on to give testimony, and yet give his decision in

Digitized by Google

his judicial capacity.—In support of these principles in addition to the authorities adduced by my very respectable colleague (Mr. Key) I will trouble this honorable court with Brookes abridgment Title, Challenge pl. 90, where he says, it is a cause of challenge to the favor if the juror has declared that should he be empannelled he would give a verdict for the plaintiff.

This authority shews that a *declaration*, as I have contended, must have been made; but I shall now also shew, that as I have before stated, the declaration must be made from motives of partiality, that is, from favor or ill will, to the one or the other party. For this purpose I will read 2d Hawkins, chap. 43. sec. 28. "It hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion before hand, that the party is guilty, or will be hanged, or the like. Yet it hath been adjudged, that if it shall appear the juror made such declaration from his *knowledge* of the cause, and not out of any *ill will* to the party, it is no cause of challenge."—This doctrine is as old as the seventh of Henry the sixth; during whose reign it was determined, that though a juror had said twenty times, that if he was sworn, he would give his verdict for one of the parties, yet if he said this from the knowledge which he had of the matter in dispute and the truth of the case, such juror was *indifferent*; but if he said this from any affection to the party, the juror in that case was *favorable*, and thus judge Babington directed the Triers; see Brooke's abrid. Title, Challenge. pl. 55.

In Viner's abridgment 21. vol. pa. 266. we find the same principle recognized. It is there stated that "if a juror says twenty times that he will pass for the one party, this is not a principal challenge, for it may be that he speaks it for the *notice* which

Digitized by Google

he has of the thing in issue, and not for affection." A decision in the seventh of Henry sixth, and another in the twentieth of the same king are referred to; and the authority from Brooke, Challenge, pl. 55. before mentioned, is in the note introduced with approbation.

In 2. Hawkins Cap. 43. sec. 29. we find in confirmation of the positions I have taken, the law thus declared. "It hath been adjudged to be no good cause of challenge, that the juror had found other persons guilty on the same indictment, for the indictment is in judgment of law several against each defendant, for every one must be convicted by particular evidence against himself."—The same principle is established by the decisions in 4. vol. State Trials, pages 141 and 175, (which he turned to and read,) 2. vol. State Trials 255. 256. also shew that though a person is a witness in the cause, it is no reason he should not serve as a juror, and also that the knowledge which a juror may have of the case to be tried by him, is no disqualification. It also shews how questions of this nature are to be tried.

And to prove that the knowledge of the facts to be decided doth not in any degree interfere with the right of a judge to decide in the case, and that any member of this honorable court might be sworn as a witness and yet give his decision in the cause, I will read an authority from State Trials, vol. 2. page 632, where Lord Stafford, on his trial, puts this question to the court, "if I shall name any of the House of Lords as my witnesses, can that exempt them from being judges." The answer given by the lord high Steward was "no my lord, if your lordship has any witnesses among my lords here, they may well testify for you, and yet remain still in the capacity of your judges, for my lord of Strafford had a great many witnesses, who were peers."

Digitized by Google

Thus, though in this instance the judges had to decide both the law and the fact, the knowledge of any one of them in no respect formed an objection to his deciding as a judge.

I have said also that a juror cannot be examined on oath to prove that he has made any declaration which would be a good cause to challenge him for favor. To support this position, I will trouble the honorable court with two authorities.—The first, from Leach's Edition of Hawkins 2d vol. page 589 in the note.—In the Text it is mentioned as a cause of challenge, "that a juror hath said the prisoner is guilty, or will be hanged or the like, &c." In the note it is stated that the prisoner shall not examine a juror, concerning such matter, on a voir dire, because it sounds in reproach.

The second, from Cooke's case, 1 Salk. 153, where it appears that Cooke being indicted for high treason, offered to ask the jurors when called, in order to challenge them, "if they had not said he was guilty, or would be hanged." And, by the court; "this is a good cause of challenge, but then the prisoner must prove it by *witnesses*, not *out of the mouth of the juryman.*"

With these observations I shall rest the question as to what disqualifies a juror, and shall proceed to examine whether Basset was improperly or illegally sworn upon that jury which tried Callender. I have shewn that he might not only have formed, but delivered an opinion respecting the conduct of the criminal, and yet that unless his declarations tended to prove that he did not mean to give a just and impartial verdict, but to decide against propriety and right, he was competent to be sworn on the jury. The question which was put to the jurors by the court, no law required to be put, nor was any of the jurymen bound by any law to answer the question—and the judge was perfectly correct, when he said, upon the counsel insisting that the indictment should be read to the jurors, and that they should then be asked if they had formed or declared an opinion as to

Digitized by Google

the charge in the indictment, that the court had already indulged them beyond what they were entitled to by law.

But to proceed with Basset.—What was his situation? He expressed no wish to be excused, provided there would be no impropriety in his being sworn, but from a delicate scruple he informed the court, that he had seen in the newspapers, extracts said to be taken from The Prospect Before Us; that he had no knowledge whether they were truly extracted, but if they were, and the context did not explain away the apparent meaning of the extracts, he had made up his opinion unequivocally that their author came within the provisions of the sedition law. But let us suppose that Mr. Basset had actually seen and read The Prospect Before Us, and had found the extracts fairly taken from it, and had formed and declared his opinion, that it was a publication which came within the sedition law; as to Callender, it would have amounted to no more than this, that if he was the author or publisher, and could not prove the truth of his charges, and had published them maliciously, to defame the President of the United States, he ought to be punished. And what honest man ever thought differently?—None, whom I ever heard speak of the book. Whether the extracts he had seen agreed with the contents of the book—whether the context supported the apparent meaning—whether the charges were true—whether Callender was the author or publisher—and if so, whether he wrote or published them maliciously to defame, &c. were subjects of which Mr. Basset was ignorant, and on which he had declared no opinion. On these questions he was at liberty freely to decide according as the evidence in the case should justify him.

But it is said, this opinion formed, and declaration made, was improper, because they say the criminal ought to have the law and the fact both decided by the jury; and a juror should have his opinion as little made up on the law as on the fact. Hence then, we are to infer, that as want of knowledge of the law is the best qualification for a judge, so the ignorance of the law is

Digitized by Google

the best qualification for a juror; and yet we are told, that a juror has a constitutional right to determine the law, and that too, in defiance of the opinion of the court! Thus, it seems, the more ignorant they are, the greater our security for obtaining a just decision! I admit, the greater their ignorance, the better will they be qualified for taking what is contended to be the *due* impression from the exercise of what, we are told, is the *constitutional* right of counsel!

But in this case, as appears from the testimony, there were others besides Callender concerned in printing and publishing The Prospect Before Us; suppose some other person, for instance Mr. Rind had also been indicted,—that on the trial of Rind Mr. Basset had served as a juror, and had found him guilty; that Callender had afterwards been brought to trial, and Mr. Basset had been called as a juror; he could not be set aside according to the authorities I have produced, although in the case of Rind he had, and that on oath, declared his opinion of the law.

Mr. Basset, although being possessed of a liberal fortune, he doth not now practice, was bred to the law; his legal knowledge was such that he could not doubt but that such publications as The Prospect Before Us came under the provisions of the sedition law. —And it is, for this reason, that the managers contend he ought not to have been sworn. Yes, sir, this very knowledge of the law which rendered him a more proper character to serve on the jury, is by the honorable managers insisted on as what ought to have been his disqualification! And yet they contend that the jury have the uncontrolable right to decide upon the law!

Suppose Mr. President, a person to be indicted for an assault and battery—or for burglary—if any person should be summoned on the jury, who had so much common sense and general information as to know that the man who comes behind the back of another and knocks him down, is guilty of an assault and battery, he would be unfit to serve as a juror in the first case;—or to know that if a man breaks into a dwelling house in the night time, and steals therefrom, such offender is

Digitized by Google

guilty of burglary, he would be equally unfit in the last case.

Hence then it follows, that in the opinion of the honorable managers, that as judges ought to have no previous knowledge of the law relative to cases which are to be tried before them;—so also, jurors ought not to have any knowledge of what is the law, in cases to be tried before them; and that if any juror with such legal knowledge should be summoned he ought not to be admitted to serve, unless indeed he can be rendered properly qualified by the application of the *India rubber*, or by the use of the *Lethean waters*, by the one mode or the other to be reduced to that happy state of ignorance thought by the managers to be the essential requisite of a juror.

I would, before I conclude this subject, remark upon an observation made by one of the honorable managers, (Mr. Campbell) he has charged judge Chase with having caused Mr. Basset to be sworn as one of the jury for the very purpose of convicting Callender, from his knowledge of Basset's political principles.

My worthy colleague (Mr. Key) has with great strength of argument shewn that Judge Chase could not from the facts proved, be otherwise than a stranger both to the person and to the political principles of Mr. Basset. But I am aware that in reply it will be said the declaration Mr. Basset made in court shewed what were his political sentiments.—He only there declared that The Prospect Before Us, if the extracts he had seen were justified by the book, was a seditious publication. —This could be no proof that he was a federalist.—I never knew a gentleman of any political principles that did not uniformly declare, that if the sedition law was constitutional, that publication was clearly within the provisions of the law. Even his counsel have declared that they did not appear on his account, that they despised the wretch, and considered him as a disgrace to society.—They have declared they had no hopes of saving him unless by establishing the unconstitutionality of that law.

But even had judge Chase known the political princi-

Digitized by Google

ples of Mr. Basset to have been federal, it would not have justified him in excusing him from being sworn—nor would he have been justified in setting aside a juror because he was a republican, unless there had been in each case some other legal objection. There is no distinction between the two cases—the political principles of a man is not the test of his fitness to serve as a juror. If Mr. Basset had been exempted from being on the jury in consequence of the scruples he suggested, the court must have exempted all who should make similar excuses, or they would have given just cause for complaint. It was the duty of the court to direct the jurors to be sworn as they were called, against whom there was no legal objection—I flatter myself I have sufficiently shewn that against Basset there was no such objection—that the judge was not only free from impropriety in directing him to be sworn, but that his conduct would have been censurable had he acted otherwise; and here, sir, I conclude my observations upon the second article of impeachment.

I now come, Mr. President, to the third article, wherein my honorable client is criminally charged for the rejection of the evidence proposed to be derived from Col. John Taylor.

In this part of the case the facts are admitted. The next question of law, therefore, which presents itself for discussion, is whether or not Col. Taylor's evidence ought to have been received, or was properly rejected. Here again I must observe that the honorable managers to support their charge, resort to principles which are to me, to the last degree, strange and novel.—We are told that the court has no right to order questions which are meant to be put to a witness, to be reduced to writing. Nay, that the court have no right to know what evidence is meant to be given by the witness, or its connexion with other testimony, or its bearing on the cause, but to receive it drop by drop, as the counsel think proper to deal it out. In answer to these extraordinary ideas which we have had thus introduced, I must be permitted to assert, that the court have, in my opinion, an undoubted *right* to require of the counsel

Digitized by Google

that they should open their case, explain the nature of the evidence meant to be given, and on the production of a witness, state what they expect to prove by such witness. In the course of my practice it has been the usual method of proceeding for counsel to conduct themselves in this manner—and on this subject M'Nally, in his rules of evidence, page 14, expressly lays it down as a *rule*, "that counsel ought not to call a witness without first opening to the court the nature of the evidence they intend to examine to. This has been *often solemnly adjudged*, though *not strictly adhered to in practice.*" And in page second he gives us as the *first* rule, "that no evidence *ought to be admitted to any point* but that on which the issue is joined." But how is a court to prevent, and it is only the court which can prevent, evidence being admitted which is not pertinent to the point on which the issue is joined, unless they are first informed what evidence is meant to be given? It is then upon the authority of M'Nally established, that the court have the legal right to know what counsel mean to prove by a witness—and having that right, they may exercise it whenever in their discretion they may think it necessary.

To determine, therefore, whether they acted correctly in rejecting the testimony of Col. Taylor, let us examine what testimony they hoped to obtain from him; and for this purpose, what were the questions proposed to be put to him. They were,

1st—Did you ever hear John Adams express any sentiments favorable to monarchy, or aristocracy, and what were they?

2d—Did you ever hear Mr. Adams, while Vice-President, express his disapprobation of the funding system?

3d—Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?

Col. Taylor's testimony was offered as being relevant only to one set of words stated in the two counts of the indictment, to wit, "he (meaning the said President of

Digitized by Google

the United States) was a professed aristocrat. He (meaning the President of the United States) had proved faithful and serviceable to the British interest; (inuendo) against the interest and welfare of the United States."

Need I state to this honorable court, that words, which do not in themselves, or on the face of them, purport any thing criminal, cannot be made so, or considered as libellous, but by laying an *inuendo* giving them a criminal meaning, without which they would be innocent,—and also that the criminal meaning laid in the inuendo must be strictly proved.

Let us now examine the set of words to which Col. Taylor's evidence was meant to apply, they were without any inuendo, as follows: "He was a professed aristocrat, he had proved faithful and serviceable to the British interest."

This sentence consists of two separate distinct clauses or parts; the first, that "he was a professed aristocrat"—The second, that "he had proved faithful and serviceable to the British interest." I ask this honorable court if either of these clauses or parts, of themselves, and without an inuendo, carry with them any charge of criminality, or any thing libellous? To say that a man is an aristocrat, a democrat, or a republican, is not of itself charging the person with any thing criminal, nor is it slanderous, unless indeed the charge is accompanied with an inuendo, stating that by the epithet so *used*, something very bad was intended; and *that* government would indeed merit contempt in which a person should be punished upon such a charge. So also, to say that a man had been faithful and serviceable to the British interest charges him with nothing criminal, and therefore cannot be slanderous, because the British and the American interest in many instances have been and may be the same.

There may be a variety of instances in which the interest of two nations may concur. There have been many in which the interest of America and of Britain did concur; many also in which the interest of America and France have combined. In the first instance a

Digitized by Google

man may have been faithful and serviceable to Britain; in the other to France, without the violation of any duty to the United States, without having been guilty of the least criminality.

The sentence then taken altogether connecting the two clauses, does not of itself import any thing criminal, and consequently is not slanderous, if it remained without any innuendo, and if it was free from an innuendo being not slanderous, would not require any evidence relative thereto—Nay, it would be no part of the charge put in issue, for in legal construction it is only such part of the publication stated in an indictment, which is slanderous, that is the point in issue.

I will now, sir, read that part of the indictment, in connection with the innuendo. "He (meaning the President of the United States) was a professed aristocrat." Here there being no innuendo, this clause or part of the sentence remains in its primitive innocency; —"He (meaning the President of the United States) had proved faithful and serviceable to Great Britain." This of itself, as I have observed, is perfectly innocent; but here comes the innuendo with its sting in its tail—"Innuendo, against the interest and welfare of the United States of America." Thus it was only the *latter* clause in the sentence that was presented as being libellous; and how was that part of the sentence to be justified? By shewing that the President had, in the high station he had occupied, prostituted his character by sacrificing the interest of the United States to the interest of Great Britain. And how was this justification to be proved? Not by any answer Mr. Taylor could give to the *first* question, for that as far as his answer could have relation, could only relate to the first clause; but that clause being of itself inoffensive, and not made criminal by any innuendo, was no part of the *criminal charge in issue*, but was merely introduced as being part of a sentence, the latter clause of which was only charged to be criminal. Any evidence from Col. Taylor as to the first clause was therefore totally irrelevant, as not going to the point in issue, and as only going to prove the truth of what was neither stated nor relied on

Digitized by Google

as being criminal; and therefore was properly rejected by the court.

As to the second question, to wit, "Whether Mr. Adams, while Vice-President, had expressed his disapprobation of the funding system?" The question could not be in any degree relevant to the one or the other clause in the sentence.—Whether Mr. Adams expressed his disapprobation while he was Vice-President, of the funding system, or not, could in no respect go to prove or disapprove his being a professed aristocrat, or his having sacrificed the interest of the United States to the interest of Great Britain. The court therefore considering this question totally irrelevant to the "point in issue," did as was their duty to do, they refused to suffer it to be put to the witness.

So much for the two first questions. We now come to the third, respecting the votes of Mr. Adams, when Vice-President, against the bill for the sequestration of British debts, and the bill for suspending intercourse with Great Britain. For the conduct of my honorable client in refusing to permit this question to be put to Col. Taylor, two reasons may be assigned; the first, that if the fact was as stated, it could not be proved by Col. Taylor. The second, that if the fact was established, it would be totally immaterial to the issue:—Col. Taylor's evidence was not the best which the nature of the case admitted. I will not say that the traverser, in order to prove this vote, was under the necessity of procuring a copy from the journal of the senate, properly authenticated by their clerk, but he certainly ought at least to have produced a printed copy of the votes and proceedings of the senate as published by them. One thing at least is certain, that the traverser could not consistently with rules of law, give parole evidence to establish the vote of Mr. Adams, and therefore that Col. Taylor could not be legally examined on that subject. But I will go further in defence of my client, and will say, that if they had had the best possible evidence of the fact; if they had had an attested copy from the records of the senate, the judge would have departed from his duty if he had permitted the evidence which was wish-

Digitized by Google

ed to have been obtained from Col. Taylor, to have been given to the jury. Ought any evidence to be given to a jury which is not proper and pertinent to prove the *fact in issue*, or to prove some fact from which the fact in issue *ought* legally to be *inferred*—evidence not relevant to the point before the court and jury?—Was not, as to this part of the charge, the fact in issue, whether Mr. Adams had swerved from his duty by intentionally prostrating the interest and welfare of his country to the interest and welfare of Great Britain?—Should not a charge of so atrocious a nature be proved by some direct act of this criminal sacrifice of the interests of the United States to the interest of Great Britain, or by the proof of some other act from which such criminal sacrifice must and ought on principles of law to be clearly and necessarily inferred? And what was the proof proposed to be offered for this purpose? That upon the question whether British debts should be sequestered, and whether our intercourse with Great Britain should be suspended, after full discussion one half the members of the senate voted in favor of those measures, and one half of the senate against them—And that in this situation Mr. Adams thinking them of too hazardous a nature, and such as might involve our country in a war, did not choose to take upon himself so great a responsibility as to give his casting voice in the affirmative.

I have, Mr. President, neither time nor inclination to enter into a discussion of either the propriety or policy of those measures, but I have no hesitation to express my belief, that the honorable members who voted for or against those measures, were equally actuated by the same purity of motive. That those who voted on the one side or the other acted from the sincerest desire to promote what they respectively considered the best interests of their country.

Shall then, the rejection of the evidence, that Mr. Adams, on measures in *fieri*, on which the senate was equally divided, gave his casting vote with the senators whose political sentiments accorded with the then majority; and which evidence, if admitted, would have

Digitized by Google

proved nothing, be considered as a ground of impeachment? I say evidence, which, if admitted, would have proved nothing; for that act of Mr. Adams certainly would not have proved that he had corruptly and wickedly sacrificed the interest and welfare of the United States to Great Britain; nor would it have proved any thing, from which such sacrifice ought legally and necessarily to be inferred. Where is the man who would dare to say, that the members of the Senate who voted for or against the bill for sequestration of British debts, and the suspension of our intercourse with Great Britain, acted from corrupt motives? Is there a member of this honorable court, who believes that the Senators, who voted against those measures were actuated by a desire to promote the interest of Great Britain at the expence of their own country? Or that those who voted in favor of those measures were actuated by a desire to promote the interest of France at the same expence? The heart of every member of this honorable court, I am confident, revolts at the idea! Ought then any judge to have suffered this act of Mr. Adams to have been offered to a jury, as evidence directly to establish that he had wickedly and corruptly preferred the interest and welfare of Great Britain to that of the United States, or as evidence from which the jury ought, upon legal principles, necessarily to infer that he had thus acted.

The judge who would have permitted such evidence to have been given for such purpose, in my opinion, ought much rather to be impeached for his conduct, than the judge who should reject it.

It is the sole province of the court to determine what evidence shall go to the jury, either as proper, directly to prove the fact in issue, or to prove any facts from which that fact ought to be inferred. The court are the sole judges of the competency and admissibility of the evidence—the competency depends upon its legality; the admissibility upon its relevancy to the question in issue—If illegal, it is their duty to reject it; but though legal in its nature, yet if not relevant to the point in issue, it ought equally to be rejected; because

Digitized by Google

its production only wastes time, and has a tendency to mislead the jury.

The right of the court to decide what evidence shall go to the jury I never heard questioned till in the course of this trial. The honorable managers appear disposed to advocate a different doctrine, and as they claim the right that the jury should decide the issue without regarding the opinion of the court as to the law, so they seem to think that the court ought not to restrict the evidence to the jury—And hence they have expressed some indignation against my honorable client, because when he told the counsel in Fries's case, that they might go on as they pleased, but still subject to the direction of the court as to what evidence they might offer :—On that occasion they exclaimed—" the court took upon themselves to decide what evidence should go to the jury ! But perhaps that evidence which might have been rejected might have influenced the decision of the jury, and as the jury have a right to decide the law, uncontroled by the court, they ought to have before them all that evidence which might possibly influence their decision !" Charming doctrine ! Thus the jury are not only to decide the law on the issue, but likewise all questions of law which arise upon the proceedings in the cause and upon the evidence that is to be admitted. The honorable managers seem to forget that it is only in consequence of the right of the jury to give a general verdict that they get incidentally the *power* of deciding the law in any case, but that this cannot in any manner enable them, either as to power or right, to have any control over the court in any collateral questions.—The maddest enthusiast that ever yet advocated the rights of jurors, has never questioned the right of the court to determine upon the competency and admissibility of evidence. Such being the law, it was the duty of judge Chase, when the question meant to be established was, that Mr. Adams wickedly and corruptly sacrificed the interest of the United States to Great Britain contrary to his duty, to prevent the vote of Mr. Adams on that occasion being given in evidence to the jury, either as proper directly

Digitized by Google

to prove the fact, or from which they ought necessarily to infer it. And I again repeat, if he had suffered such evidence to have been given to them as proper and relevant, he would have been much more deserving of impeachment.

I have stated that there is two ways of proving the issue—either by directly proving the *fact* in issue, or by proving some fact from which the fact in issue ought legally to be inferred; and that in the one case and the other the court are the judges as to the competency and the admissibility of the testimony. But I go further, it is the court who have a right to determine whether or not the fact in issue *ought* to be inferred from a fact proved, or what fact, being proved, will justify a jury in inferring and accordingly finding the fact in issue. I will, sir, explain my meaning—The question in issue is a grant or no grant of a tract of land; the grant is the fact to be established; no grant can be produced, but evidence is given of possession for a great length—a regular transferrence of the property as having been granted—payment of rents to the successors of the supposed grantor, &c. the court not only determine what testimony is proper to establish these facts, but they direct the jury that if they believe the evidence, they then ought to find that a grant had been given. On this point I refer to Cowper, page 112, and 12 Coke, 2. So, sir, if in an action of *indebitatus assumpsit* for money due, the defendant pleads the act of limitation, and the plaintiff replies a promise to pay within three years—If on the trial of the cause the plaintiff proves an *acknowledgment* of the debt within the limited time, the court will instruct the jury, that if they believe that fact, they ought to find from it, as being sufficient evidence for the purpose, the fact in issue, that he did *promise to pay*. Yet if the jury was to find a special verdict, stating that within three years the defendant had acknowledged the debt, the court could not give judgment, but must order a *venire facias de novo*, because the jury would not have found the fact in issue, but only a fact which was, as evidence, sufficient to have justified them to have found by their verdict that the defendant did assume.

Digitized by Google

Again, in the case before supposed, evidence was given to the jury that the defendant had acknowledged the debt as aforesaid, the court would instruct the jury that upon that evidence they ought to find the defendant had promised, and if the jury did not give their verdict for the plaintiff, the court would grant a new trial. So, sir, in an action of trover and conversion.—If it was proved that the defendant had the thing in possession for the conversion of which the suit was brought, and evidence is given that the plaintiff demanded the article from the defendant, and that he refused to deliver it, though this is not itself a conversion, and if the jury was to find a special verdict stating these facts, the court could not give judgment, yet the court would direct the jury that upon such fact being proved, they ought to find the fact in issue, to wit: the conversion, and if the jury was not to find for the plaintiff the court would grant a new trial.—Again, in the case of an action brought to recover money and the statute of limitation pleaded—if the defendant acknowledges the justice of the debt, but at the same time absolutely and unequivocally declares that he never will pay any part of it, the court would instruct the jury that upon such evidence they could not find for the plaintiff, for that the acknowledgment of the debt being only presumptive evidence of a promise to pay it, that presumption was taken away when the acknowledgment was accompanied with a direct unequivocal declaration that he never would pay any part of it. So in the case of trover and conversion, if the thing in question was large, heavy and unweildy as a large piece of mahogany or other timber, and when the delivery of it was demanded, the defendant was to refuse troubling himself on the occasion, but to direct him to where this ponderous article lay, and tell him that he might take it into his possession when he pleased; the court would certainly say there was no proof of conversion—the *prima facie* evidence being defeated by the circumstances of the case.

I have introduced these cases by way of illustration; and to shew that the court determines what is proper evidence to prove the fact in issue—from what fact the

Digitized by Google

fact in issue may be inferred—and also what evidence is admissible to prove this secondary fact; and therefore as the vote given by Mr. Adams of which Callender wished to give evidence was not sufficient to prove directly the charge that Mr. Adams had wickedly, and against his duty, sacrificed the interest of his country to that of Great Britain—nor was a fact from which the jury on principles of law ought to have inferred it; and I am sure no person will attempt to support the contrary, therefore, that my honorable client instead of being impeachable for rejecting such evidence, would have exposed himself to censure had he admitted it.

Nor can I doubt but that the respectable counsel who were concerned for Callender, would have cheerfully acquiesced in and approved of my honorable client's conduct in this respect, had it not been for a cause, which they honestly acknowledged, their extreme ignorance of the law which relates to the doctrine of libels—and which had induced them to use every exertion to obtain a continuance of the cause to a future term, that in the mean time either in their own offices, or under the instruction of some legal character, they might acquire a more accurate knowledge of that branch of the law.—An indulgence that it seems they could not prevail upon the court to give,—for the refusal of which, however, I hope my honorable client will not be thought impeachable.

I have now, sir, finished my observations on the third article, and am under the direction of this honorable court whether I shall proceed to the fourth, or wait till they take some refreshment. (It was now three o'clock, and the court adjourned for half an hour.)

[*The court having again met, Mr. Martin continued.*]

I shall now, sir, proceed to the fourth article which charges the respondent's conduct to have been marked during the whole course of the trial by manifest injustice, partiality and intemperance.

From the evidence it certainly appears that judge Chase prevented the counsel from arguing to the jury, that the sedition law was unconstitutional; and this

Digitized by Google

seems to have given rise to a great portion of the altercation and ill humor between the court and the bench.

I admit that the constitution gives to a criminal the right of having counsel; but the constitution has not defined the rights or duties of counsel, or to what extent they are to exercise them.—One thing, however, is certain,—that they have no constitutional right to impose upon the court or to mislead the jury.

When Callender's counsel contended that if the jury have a right to decide questions of law, then the constitution being the supreme law of the land, the jury must of course have the power of deciding on the *constitutionality* of a law; the judge might well say it was a non sequitur.

What has been allowed to the jurors as their incidental right on the general issue? Not to decide whether there is an existing law, or whether a law is in force, but to declare the true construction of an *existing* law, and whether the case at issue comes within the true construction of such law.

But those who contend that the jury have a right to determine the constitutionality of a law, insist not for the power of the jury to decide its true construction and whether the prisoner's case comes within it, but to decide whether what is produced as a law is not void, a mere nullity, a dead letter; or in other words whether such a law is in existence.—The maddest enthusiasts for the rights of jurors—their most zealous advocates have never contended for such a right before the cases of Fries and Callender. Whether a law exists, whether a law has been enacted—whether a law has been repealed—whether a law has become obsolete or is in force? The decision of these questions hath always been allowed the exclusive right of the court.—The power of the court to decide exclusively upon these questions hath never been before controverted. Nay the very right claimed on behalf of jurors, that they may determine what is the true construction of the law, and whether the case is within its provisions, of itself necessarily presupposes, and is predicated upon the *existence of a law*, the *true construction* or *meaning of*

Digitized by Google

which they are to determine.—It has indeed been seriously questioned, and that by gentlemen of great abilities, whether even the judiciary have a right to declare a law passed by the legislature, to be contrary to the constitution and therefore void! I shall not enter into an examination of that question, but I have no hesitation in saying that a jury have no such right—that it never was intended they should have such right, and that if they had the right, we might as well be without a constitution.

The first specific instance of my client's unjust, partial and intemperate conduct, which is stated in this fourth article is, that he compelled the traverser's counsel to reduce to writing the questions which they meant to propound to Col. Taylor. The correctness of this procedure will depend on the question whether the court had by law such a power, for if such a power was possessed by them, it is to be presumed that they, on that occasion, exercised it according to their best discretion, nor can it be inferred that their conduct was criminal, because the procedure was *novel* in Virginia. There are cases in which the practice of a court may be considered the law of the court; but these are not in any manner analogous to the case in question; nor do I find that the *practice* of the state courts is obligatory "in any case of this kind on the courts of the United States." My honorable client did not consider what was usual in Virginia, but what was correct and proper, he knew that the law authorised him to make this demand. In Maryland, where he imbibed his legal knowledge, and where at the bar and on the bench he had carried it into practice, nothing was more common than for questions to be reduced to writing at the request of counsel, or at the request of the court. If counsel doubt of the propriety of the evidence meant to be drawn from the witness, or the correctness of the question meant to be propounded to him, they have a right to request it to be reduced to writing. So also, if the court, without whose approbation no testimony can be given to a jury, and whose duty it is to prevent improper testimony to be given, has reason to suspect an in-

Digitized by Google

tention to introduce such evidence, they have a right, and they ought to require the questions to be reduced to writing, that there may be no misapprehension of the tendency of the question, and that they may more deliberately decide whether it is proper to be put to the witness. And in this case, the counsel were not required to reduce their questions to writing in the first instance, or before they had stated what they meant to prove, as hath been suggested. When Col. Taylor was called and sworn, the court desired to be informed what they meant to prove by him. M'Nally is an authority that in so doing they acted legally. The counsel stated the facts, to prove which Col. Taylor was called; upon which, the court doubting the admissibility of the testimony directed the question to be reduced to writing for their consideration. It cannot for a moment be seriously contended, but that the court had a right so to do. As my respectable colleague (Mr. Key) has observed, the practise of this honorable court during this trial, hath perfectly sanctioned that part of my client's conduct. If at any time a question has been put, the propriety of which hath been doubted, it has been directed to be reduced to writing;—It is true, that this has been principally, when an objection has been made by the counsel;—but there can be no doubt, that if any honorable member of this court had apprehended the question to be improper, the court would have had a right, and would have directed the question to be propounded in writing for their consideration. The propriety, the principle, in each case is the same. On this part of the charge I need not dwell any longer.

The *next instance* of the judge's conduct specified in this article is his refusal to continue Callender's case to the next term, notwithstanding the affidavit filed, and the applications made.—On this subject, I shall not make many observations as to the law; but I may venture to assert that the conduct of judge Chase in this instance also appears to have been free from any corrupt or oppressive motive or design—no part of his conduct on this occasion has been produced to shew that he entertained a disposition, to prevent Callender from ob-

Digitized by Google

taining the testimony of his witnesses, or to deprive him of the necessary time to procure their attendance. Let it be recollected that the first affidavit prepared and proposed to be filed in order to obtain a continuance of the cause was a general affidavit. By the laws of England a general affidavit is not sufficient to entitle the party to a continuance—and upon principles of law as adopted in England and in the United States, at least in Maryland, a supplemental affidavit cannot in a case of this nature be received.

If then judge Chase had wished that Callender should have been, at all events, prevented from a continuance of his cause, he would have suffered them to have filed their general affidavit.

According to the laws of England, and so is the law considered in Maryland, to entitle the party to a continuance, he must file an affidavit shewing what witnesses he wants—what he expects to prove by them—that he has used due diligence to procure them, and that he has a reasonable expectation to procure their attendance at some time.—Judge Chase, had he wished that Callender should be deprived of a continuance of his cause, would have suffered them to file their general affidavit, but what was his conduct? Desirous, they should not improperly and hastily commit themselves, and lose advantages to which they might be entitled, he gave them a caution, and time till next day to profit by it. On the next day they did, it is true, file a *special* affidavit; but this special affidavit so drawn up, under the caution given them by the court, is not such as can in any degree, stand the test of legal investigation even under the authority, which one of the honorable managers (Mr. Rodney) hath this day introduced.—Callender did not in his affidavit state that he expected to be able to procure his witnesses at the next term, the term after, or at any term: He also stated that there were certain books necessary for his defence, but he did not state that he had endeavored to procure them before—or that he expected to get them against the next term.—And surely, if when Callender wrote that libel, he founded any part of his charge upon books which had

Digitized by Google

been published, he ought to have had them by him when he wrote and published, and to have kept them by him for his defence whenever he should be called upon to answer for that publication, and could have no right to claim a continuance for the purpose of obtaining such books. One of the honorable managers (Mr. Rodney) has this morning referred us to 6th vol. Bacon's Abridgement, from page 650 to 652, upon the subject in contest, the mode of putting off a trial, and there as he acknowledges, and as the authority enforces, "if there is any cause of suspicion, that delay is the object, the court should be satisfied from circumstances, that the person absent is a material witness—that the person applying has been guilty of no laches or neglect—and that he is in reasonable expectation of being able to procure his attendance at some future time." That the court had in Callender's case just reason to believe that delay was the sole object of the counsel, no person can doubt—Nay, the counsel themselves have upon oath declared, that delay was their object—that they had no hope or expectation that witnesses could be of any service to them—that they considered Callender's cause desperate if the law was constitutional—and that their great object was to continue the cause to another court that it might not be tried before my honorable client, of whose conduct in the case of Fries they had heard, and against whom they had formed, it seems, the most decided prejudices.

This authority then produced by the honorable managers, perfectly justifies the conduct of my client, in refusing upon that affidavit, to continue the cause to the next term. The court was then sitting to hear the charges brought before them—it was their duty to have them determined without unnecessary delay, that if the party was innocent he should be acquitted, if guilty that he should be brought to speedy punishment. The same honorable manager has from the same authority shewn, "that upon the particular circumstances of the case the court will make a rule for putting off the trial of a cause to the second term after the rule for putting off the trial is made." I admit the law, and will there-

Digitized by Google

fore readily admit that if an affidavit had been made by Callender stating that he expected to be able to prove certain facts, stating what the facts were, by witnesses, who from their particular situation, could not with any probability be produced before the second term, after the affidavit, and could then probably be had, the court might with propriety, and perhaps ought to have continued the cause to the second court, but no such affidavit was made; therefore not having made out such a case, they have no reason to complain that they had not the benefit of it. They did not even swear that they expected to be able to procure the attendance of their witnesses at any time whatever.

A case has also been referred to in Cowper's reports, where the defendant wanting the testimony of a witness who lived out of the jurisdiction of the court, and the court not having the power to issue a commission to obtain his testimony, the court declared that if the plaintiffs would not consent to have the deposition of such witness taken to be read at the trial, they would continue the cause indefinitely. The honorable manager has further said that though in England the court cannot issue a commission to examine witnesses, yet here the court has a power to issue a commission for that purpose. This honorable court will recollect that the case of Callender was a criminal prosecution, I doubt whether the court has any power in a *criminal* case to issue a commission to examine witnesses for or against the prosecution;—I do not know of any law which gives them that power.—If the honorable managers know of such a law, they will be so obliging as to refer us to it.—But I will take up the objection upon each view, suppose a commission might have been issued, the counsel of Callender did not apply to the court to grant a commission, and to continue the cause till the commission was returned. Suppose a commission could not be issued, Callender's counsel did not apply to the attorney general of the district for his consent, that these witnesses should be examined where they lived, and their deposition be read in evidence on the trial, they did not apply to the court for their deter-

Digitized by Google

mination, that the counsel for this prosecution should consent to this, and that if he refused, the cause should on that ground be continued. Had they prayed a continuance on either of these grounds, and it had been refused, they might have had some pretext under their authorities for complaint, but this ground they never attempted to take.

Had they prayed for a commission, and the law authorised it, it is to be presumed the court would have granted it, if the court could not grant a commission, and the defendant's counsel had proposed that the depositions of absent witnesses should be taken to be read at the trial, it is possible the court would have continued the cause unless the prosecutor would have consented that depositions should be thus taken. Hence therefore on no principle doth it appear that there was any thing improper, incorrect or illegal, in refusing a continuance of the case of Callender.

But, sir, there is another ground upon which the conduct of the court was strictly justifiable in requesting to know by the deposition what the absent witnesses were expected to prove, and also in refusing to continue the cause —Upon their own statement, the witnesses wanted were only material to a few of the charges in the indictment.—Their absence therefore could not be a sufficient reason to put off the trial.—The attorney might have struck out of the indictment those sets of words to which their testimony was wanted, and proceeded to the trial, upon the other part of the charge. —And as the punishment both as to fine and imprisonment was discretionary, not exceeding a certain sum and time,—Callender was equally in the power of the court, convicted on a part, as if he had been convicted on the whole of the charges—and the court having the discretion, and having refused a continuance for the want of the testimony suggested, had it in their power, when they passed sentence, to throw out of their consideration, those parts of the charge for which the testimony was wanted.

And on this subject the case put by my respectable colleague (Mr. Key) is perfectly in point; he supposed

Digitized by Google

the case of a person indicted for stealing a horse, saddle and bridle; to delay the trial, the prisoner suggests the want of witnesses—the court compel him to declare in his affidavit what he expects to prove by them. It appears that he only wants to prove that the bridle was his own! This surely would be no cause for delaying the trial. The prosecutor might instantly strike out of the indictment, the bridle, and there could not be the least pretext for not going to trial upon the residue of the charge, the stealing the horse and saddle. So in Callender's case, the want of witnesses to justify as to a few sets of words, could afford no reasonable cause why he should not be tried upon a dozen or more sets of libellous words, charged in the indictment, as to which he did not pretend to alledge that he wanted a witness.

In Maryland, it has ever been the practice to try criminal prosecutions of what nature soever at the first court, if practicable, and not to continue them unless some legal cause is shewn. Judge Chase had been accustomed to this mode of proceedure. It was in Maryland that he acquired the first rudiments of law. It was in that state that his legal knowledge was matured by practice.

Why should capital cases, rather than inferior crimes, be tried the first court? The honorable managers admit that it is the general rule not to continue, but to try at the first term, capital cases. Surely if indulgence, if delay is necessary in any case, it is in a capital case, where life is at risque; where an injury, if done, is irretrievable!

There are many reasons which shew the propriety that prosecutions of every kind should be decided with as little delay as possible. One of the principles as to criminal jurisprudence, as governor Claiborne has justly observed, is that tho' punishments should be mild, yet they ought to be *speedy*; by having an immediate decision there is a greater certainty that the criminal shall not elude justice by flight. The expence, whether to the criminal or to the public, is encreased by delay; delay also hazards the loss of testimony by the

Digitized by Google

death or absence of witnesses; and therefore diminishes the chance of having justice done, either to the party or to the public, the one or the other of whom may be essentially injured for want of testimony, which might have been had if the trial had not been delayed; but even if witnesses live, and can be had at the trial, yet the lapse of time impairs memory, and their testimony cannot be relied upon in the same manner as if they were examined immediately after the transaction, when every circumstance would be fresh in their memory. These, with many other reasons which might be given, have actuated our courts of justice in Maryland, never to continue criminal prosecutions of any kind, if it can be avoided; and shew the propriety of their conduct.

The next specification, in this article, of improper conduct in the judge, is, that he "used *unusual*, RUDE, and *contemptuous expressions* towards the prisoner's counsel; and insinuated that they wished to excite the public fears and indignation, and to produce that insubordination to the law, to which the conduct of the judge did at the same time manifestly tend." As to this part of the charge, there is but little of a legal nature contained in it, I shall therefore hastily pass over it. If true, it seems to be rather a violation of the principles of politeness, than of the principles of law; rather the want of decorum, than the commission of a *high crime and misdemeanor*. I will readily agree that my honorable client has more of the "*fortiter in re*," than the "*suaviter in modo*," and that his character may in some respects be considered to bear a stronger resemblance to that of lord Thurlow than to that of lord Chesterfield; yet lord Thurlow has ever been esteemed a great legal character, aad an enlightened judge.

But let me ask this honorable court whether there is not great reason to believe that the sentiments my honorable client expressed with respect to the conduct of the counsel, and their object was just and correct? What was the conduct of Callender's counsel? Was it not such as immediately tended to inflame the minds of the

Digitized by Google

bystanders, and to excite their indignation against the court, and highly insulting to the judges? In the first place, they endeavoured to obtain a continuance of the cause to the next court, merely with an intention to procure delay, and to prevent the cause being tried before judge Chase, acknowledging that they had no hopes or expectation from *any testimony* to save their client if the law was determined to be constitutional; and yet they brought forward their client to swear just what they pleased, in order to procure this delay, with respect to the necessity of witnesses, whose testimony they acknowledge they were conscious could be of no service to them, and yet they wished the bystanders to consider the court acting highly *improper* for not granting that continuance! Was this even to serve Callender? No, they avow they did not appear to serve him, but to serve *the cause*. Sir, it appears from their own evidence that Callender would have submitted to the court, but for their interference; that they volunteered on the occasion not for *him*, but for *their cause;* and yet the volunteers wanted the court to give them to another term to prepare themselves, and made Callender swear what they pleased to effect their purpose. They said they were not well acquainted with the law upon libels, and therefore wanted time to examine the subject; but surely when persons undertake to volunteer their services on any subject, they ought to be masters of it, and are entitled to no indulgence of delay. And as they declare they had formed the determination, on the first instance of an indictment under the sedition law, to come forward and volunteer their services for the sake not of the man, but of their cause, common decency to the court, and a proper respect for themselves, ought to have dictated to them in the interim to have made themselves fully acquainted with all the law relative to that subject in which they had thus determined officiously to interpose.

In the next place, when the jury were about to be sworn, they challenged the array in order to set aside the whole pannel. Such challenge can never be made correctly, but for the jury being returned by an officer

Digitized by Google

not authorised, or for unfair and partial dealings in the officer who summons the jury. The reason assigned was, that one of the jurors who was returned had expressed sentiments inimical to Callender. This, if true, might be a good cause to challenge the individual juror for favor, but no boy, who had read in an office six months, would have supposed this a sufficient cause to have challenged the array, unless it had been further alledged that the marshal knew the juror had expressed such sentiments before he had summoned him, and had summoned him for that reason, which was not suggested. Is it possible to believe that legal characters of so great estimation, that one of them was then the attorney general of the state of Virginia, another almost immediately after appointed attorney general of the United States for the district of Virginia, and the third, appointed one of the chancellors of that state, should have been so utterly ignorant of the law relative to the challenge of the array, as to have made the motion they did? If not, it must be presumed their conduct was influenced by a wish to embarrass the court; to hold up the prosecution as oppressive; to excite public indignation against the court and the government, who endeavoured to enforce it, by attempting to impress a belief on the public mind, that even their marshal had, in the very beginning, violated his duty to gratify the wishes of an oppressive government, and that for that purpose he had unfairly packed a jury! Was not this immediately, was it not designedly done for the purpose of exciting public indignation? What was the conduct of the same counsel when the court desired them to reduce to writing the questions they meant to propound to col. Taylor? They have declared they hesitated whether they would do it; and before they did comply with the court's direction, they made a direct effort to hold up to the bye-standers that the court was acting with oppression and partiality to the prejudice of Callender, by imposing on his counsel difficulties and impositions which the court had not imposed upon the counsel for the prosecution! Whereas in fact the counsel for the prosecution had fairly stated

Digitized by Google

the testimony he meant to offer, before he produced his witnesses, having no desire that the jury should be surprised with improper evidence,—whereas the counsel for Callender wished to have witnesses examined to the jury, without the least previous disclosure to the jury or court, of the evidence meant by them to be given; most evidently that they might have testimony illegal thus imposed upon them; and because they were, by the correct interposition of the court defeated in this object, they could not consent even to let this act of the court pass, without a direct attempt to impress upon the by-standers, that it was another instance of the unfair and oppressive conduct of the court, which ought to excite their indignation! And here let this honorable court remember that Callender, in his Prospect before us, had in the most solemn manner appealed to the state of Virginia, that if ever the time should come, when the government of the United States should attempt to prosecute him and make him a victim under the sedition law, that state was bound under every principle of interest, of justice, and of the claims he had upon them, to come forward, and at *all risks* and *by all means* to protect him. Is there not, sir, great reason to believe, that the object of counsel was to second this appeal so made by Callender, and to induce the people of Virginia to come forward to save their client from the pretended oppression of government,—to rescue him from their fangs!

One of the gentlemen who was the counsel of Callender, has told us, that whenever a prosecution should be attempted under the sedition law, he had formed the determination to come forward to prove its unconstitutionality. That in consequence of this determination in Callender's case, and *only* for that purpose, he did appear in order to argue its unconstitutionality. He has told us further, that he had no hopes of convincing the court, and scarcely the faintest expectation of inducing the jury to believe that the sedition law was unconstitutional; but yet that he wished to argue the question, with a view of making a proper impression upon the public mind; and yet he has disclosed to us

Digitized by Google

upon his oath, that when the court had charged him with wishing to address himself to the populace and not to the court, he denied the charge, and told the court he only wanted to address himself to and to be heard by the court, and did not wish to be heard by the jury and by the by-standers! When at the same time he knew he could not be heard by the court, without also being heard by the jury and the by-standers, unless they had all been, a thing unknown, sent out of the court house; or what is equally unknown, had their ears stuffed with cotton, or filled with wax; and yet the same gentleman has said on oath, notwithstanding that declaration, that it was his chief, almost his sole object upon that subject, to be heard by the by-standers, and on them to make proper impressions! What barefaced, what unequalled hypocrisy doth he admit he practised on that occasion! What egregious trifling with the court! But, I would ask this honorable court, what were the impressions which Mr. Hay was so solicitous to make on the people? Was it merely to convince them that the sedition law was unconstitutional, and ought not to be enforced? Had not the legislature of his state some time before denounced this law as unconstitutional, and destructive to liberty? Had they not circulated the denunciation throughout every part of their own state, and sent it to every legislature in the union? Do not let me here be understood to censure that honorable body, or to question the propriety of their conduct, or the rectitude of their motives; far be it from me to doubt that they honestly believed the law to be unconstitutional, and fraught with all the evils which they suggested would flow from its execution: and therefore that they thought it a sacred duty to act as they did. I am not in the habit of questioning the motives which influence public or private bodies; it is my duty to leave that question to their own consciences and to their God; I myself view them in the most favorable light: I only mean to state as a fact, a transaction of notoriety; but can it possibly be supposed after this, the people of Virginia wanted a speech from Mr. Hay, to induce them to consider the sedition law

Digitized by Google

unconstitutional, or could he expect that those who doubted after being so well acquainted with the sentiments and conduct of their legislature, would be made converts by any thing they should hear from him? No sir, no person can think it. What then was his motive? Was it not to impress on the people, that, not only an unconstitutional, oppressive law, was about to be enforced; but also that the court, in order to enforce it, was acting in the most unfair and oppressive manner, as well as the marshal; and thereby to inflame the resentment and indignation of the populace against the court? I will not say that he really wished so far to have excited their violence against my honorable client as to have endangered his life; but it is impossible that I should doubt but that it would have given him pleasure, that their violence should have been so far at least excited, as to have intimidated the court from executing this obnoxious law.

When my honorable client went from Baltimore to Richmond, to hold the circuit court, he knew how violently that state was opposed to the enforcement of this law; but he equally knew that it was his duty to carry it into execution, without regard to the sentiments of any portion of the community, or however disagreeable it might be to them. Under these circumstances he went to Richmond, and found the counsel from the first step in this cause, attempting, as he could not but consider it, to inflame the audience and excite their indignation against him. My honorable client, who well knows mankind, and has been accustomed to popular assemblies, appears to have been anxious, as his best security, to keep the by-standers in good humor, and to amuse them at the expence of the very persons, who were endeavoring to excite the irascibility of the audience against him. Hence the mirth, the humor, the facetiousness, by which his conduct was marked during the trial; and which, most fortunately, was attended with the happy consequence he hoped from it, for it is admitted that he kept the by-standers in great good humor, and excited peals of laughter at the expence of the counsel, as the witness very justly

Digitized by Google

concludes, for he says, " the counsel did not appear to join in the laugh." And this, sir, most satisfactorily accounts for the more than usual exertion of his facetious talents on the trial of Callender; and I doubt not was the real cause of that exertion.

Among the different charges made against judge Chase of rudenesss, and unusual language by him used towards the counsel of Callender, we find it stated, that when the judge had repeatedly declared, the counsel could not be permitted to argue to the jury the constitutionality of the law, and one of the counsel, who appears to have felt particularly sore on the occasion, still urging that question to the jury, the judge interrupted him, and declared that the counsel of Callender had from the first mistaken the law, and that they had persisted in pressing their mistakes on the court. Never was there a more proper or correct expression used by a judge. Never, I believe, did the conduct of lawyers more fully justify such a charge! And, if the abilities of the counsel are as great as they are represented to be, it is almost impossible not to believe, their errors were intentional, and with the express view to embarrass the court. In the first place, they insisted that the jury, not the court, was on the indictment of Callender, to assess *the fine*, which should be imposed upon him, if found guilty. This was one of their errors, and a most egregious error it was. And yet my honorable client has been charged with *rudeness* for calling it as one witness states, " a wild notion."—Or as Mr. Robertson has it in his *short hand*, " a mistaken notion." Either of these expressions was in my opinion extremely mild. I, sir, should not have hesitated in calling it a *mad* notion.

The idea that the array was to be quashed because there was returned an individual juror, who was supposed to be liable to be challenged, was another mistake; a mistake that even a school boy in law could scarcely be expected to have made. The affidavit so incorrectly drawn, and their insisting on a continuance of their cause in consequence of that incorrect affidavit, was another mistake.

Digitized by Google

An additional mistake, was their idea that the court had no right to know what testimony they meant should be given by the witness produced, and that it was improper to require that the questions meant to be propounded to Col. Taylor, should be reduced to writing. —And the attempt to obtain from the jury a decision that the sedition law was unconstitutional, in which they so pertinaciously persisted, was also an error. I ask then whether, when the counsel had been guilty of all these mistakes, it did not perfectly justify my honorable client in the expressions he used, that they had been from the first mistaken, and that they had continued throughout pressing their mistakes upon the court? Nay, did it not justify the observation used by him, which has been urged as most exceptionable, "that they must know better; and that their conduct was intended to influence the by-standers."—That the counsel's great object was to give an impression to the people has been acknowledged on oath; and the court must have had a very moderate idea indeed of the legal abilities of Callender's counsel, if they could have supposed such a succession of errors to have arisen from ignorance.

But the judge is also charged with great rudeness in the manner in which he replied in one part of the argument to Mr. Wirt, just at a time when that gentleman had finished a syllogism; by replying that it was a *non sequitur*.—I will state the transaction. Mr. Wirt having, as he supposed, established the position, that the jury had a right to decide the law as well as the fact, he proceeded to state that the constitution was the supreme law of the land, and therefore that since the jury had a right to decide the law, and the constitution was also the law, the jury must certainly have a right to decide the constitutionality of a law made under it; and this conclusion was, as he declared, perfectly syllogistic. As Mr. Wirt had assumed the character of a *logician* in his argument, nothing could be more natural than for the judge in his answer, to assume the *same character*: He therefore replied, like a logician, "a *non sequitur*, sir;" The correct answer to a syllogism,

Digitized by Google

which is rather lame in its conclusion. But it seems this answer was accompanied by a *certain bow*. As *bows*, sir, according to the manner they are *made*, may like *words*, according to the manner they are *uttered*, convey very different meanings; and as it is as difficult to determine the merit or demerit of *a bow* without having seen it, as it is the expression of words without having *heard* them; to discover, therefore, whether there was any thing *rude* or *improper* in this *bow*, I could have wished that the witness, who complained so much of its effect, had given us a *fac simile* of it. Had we been favored not only with the answer, but also with a complete *fac simile* of the *bow*, we might have been better enabled to have judged of the propriety of my honorable client's conduct in this instance. But it seems this *bow*, together with the "*non sequitur*," entirely discomfited poor Mr. Wirt, and down he sat "and never word spake more!"—If so, it was a saving of time. But we have no proof that Mr. Wirt meant to have proceeded any further in the argument, even had he not been encountered with this formidable bow and non sequitur. And the presumption is, that having condensed the whole force of his argument into a syllogistic form, and finding his syllogism did not produce the conviction intended, he took his seat without wishing to spend more of his breath in what, after the failure of his logical talents, he no doubt considered a fruitless attempt. Mr. Nicholas followed Mr. Wirt, he is a gentleman mild and polite in his manners, he was treated by the court with politeness. He did not *persist* in addressing the jury contrary to the decisions of the court, he therefore met with no interruptions.

We have now more particularly to discuss the charges made against Judge Chase, as they relate to Mr. Hay, the other counsel for Callender. Mr. Hay insisted that the indictment could not be supported, because the title of Callender's publication, parts of which were charged to be libellous, was not inserted in the indictment, to wit, because it was not stated in the indictment that the book, which contained the libellous matter, was called "The Prospect Before Us." And to

Digitized by Google

support this objection he went on to prove, that when an indictment states libellous writings in tenor following, the libellous part of the writing set forth, and on which the indictment is found, must be set forth "verbatim et literatim!" There was no attempt to shew that any expression in the indictment, was not stated correctly both *verbally* and *literally*, as published by Callender. The indictment did not charge the title of the book as being libellous. It did not notice the title of the book in any manner. If the title of the book was necessary to have been inserted, which I deny, there could not have been a more absurd or inconclusive argument to support the position, than that upon which Mr. Hay relied; and the judge shewed great temper in merely exposing it to ridicule in the manner he did, by observing, that as he insisted the libellous matter should be set out *verbatim* et *literatim*, he wondered he had not also insisted it should be set forth *punctuatim*. An observation, by the by, which perhaps contained full as much of good sense as of smartness, since we all know the same words written or printed, will be liable to different constructions, and convey very different meanings, as they are punctuated. Mr. Hay, it appears from his own testimony, as well as the testimony of the other witnesses, was guilty of very improper conduct to the court. He insisted that if the prisoner was convicted upon that indictment, he might again be indicted for the same offence, and could not defend himself by the conviction on the indictment then before the court. When the court assured him he was mistaken in the law, Mr. Hay still persisted and declared, that he should not be more surprised, even if Mr. Callender should again be indicted for the same offence, and should be punished a *second time* for the same offence, than he was surprised at the indictment then before the court, and the attempt to punish Callender in consequence of that indictment. What language, I pray you, could be used to the court, but in reality addressed to the populace, more derogatory to the then administration, as being unprincipledly oppressive, or containing a more direct attack upon the integrity of

Digitized by Google

the judges, holding them up as the venal tools of the then administration, ready to be the instruments of its oppression!

What was also the final conduct of Mr. Hay, when having repeatedly attempted to argue to the jury against the direction of the court, and having as repeatedly been interrupted and stopped by the court? He took up his papers to withdraw; upon which the court told him, if he pleased he might proceed. His answer was, "I *will not*." When the court further observed, you will not Mr. Hay, be captious, go on if you please in any manner you choose, and we will not interrupt you. Even then, when in my opinion, the court had, as in Fries's case, made improper concessions, what was his answer? "I am not captious, *but I will not proceed*." And he folded up his papers and withdrew.

How came he thus to act? As to Callender, he acknowledges he despised the wretch, that his object was to serve *the cause*, not Callender. How was he to serve the cause? By giving an impression to the public mind. What impression did he wish to give? By holding up the idea of oppression on the part of the government, and corruption on the part of the court. But finding himself thus foiled in his attempt, by the superior abilities of my honorable client, and his superior knowledge of mankind; finding that, instead of exciting indignation against my client, my client most fortunately had excited against him the laughter and ridicule of the auditors, he went out in a passion. At the same time, even the manner in which he left the court shewed his wish to impress the public mind, as far as possible, with sentiments disadvantageous to the court. And as to the interruptions Mr. Hay received, they are clearly proved to be in consequence of his pertinaciously attempting to act contrary to the direction of the court, and in that case the only question could be, whether the court or Mr. Hay had the control over the other.

But, sir, there is another charge which has been made against my honorable client, to justify that part of the article which accuses him of *rudeness*. It is said that

Digitized by Google

speaking of Callender's counsel, or addressing himself to them, he called them "*young gentlemen.*" To me it appears astonishing, that these expressions if used by the judge, should be thought reproachful to the counsel, or a proper subject of a criminal charge; and it gave me real pleasure to find that Mr. Nicholas, whose whole conduct marks him as a gentleman, did not consider them offensive. He has observed that he was young at the time, and whoever has seen him as a witness, must be convinced of the truth of his assertion. But we are told that Mr. Wirt was at that time about thirty years of age, had been a married man, and was then a widower. It doth not appear that judge Chase knew of these circumstances; but if he had, considering that Mr. Wirt was a widower, he certainly erred on the right side, if it was an error, in calling *him* a *young* gentleman. But, sir, let it be considered that my honorable client has been stated by the honorable managers, to be nearly three score and ten, let also his great legal attainments be considered, and let me ask, if any person can think his addressing gentlemen, so much inferior to himself in age and knowledge, by the epithet of "young gentlemen," *offensive* to them, much less *criminal* as to the public? But as another instance of his rudeness we are told, that addressing himself to Mr. Wirt, who observed that "he was going on," the judge replied "no sir, I am going on, therefore sit down, sir." This address was made by the judge to Mr. Wirt, when he (the judge) was about to give a long opinion to him and the counsel employed with him, which opinion, upon Mr. Wirt's sitting down, the court did give. And pray, sir, was there the least impropriety in a situation of that nature, that the court should desire the counsel to be silent and to take their seats?

Before judge Chase went from Baltimore, to hold the circuit court at Richmond, he knew that the sedition law had been violated in Virginia. I had myself put into his hands The Prospect Before Us. He felt it his duty to enforce the laws of his country. What, sir, is a judge in one part of the United States, to permit the breach of our laws to go unpunished, because they are

Digitized by Google

there unpopular, and in another part to carry them into execution, because there they may be thought wise and salutary? And would you really wish your judges, instead of acting from principle, to court only the applause of their auditors? Would you wish them to be what sir Michael Foster has so correctly stated, the most contemptible of all characters, popular judges: Judges who look forward in all their decisions, not for the applause of the wise and good; of their own consciences; of their God; but of the rabble, or any prevailing party? I flatter myself that this honorable senate will never, by their decision, sanction such principles! Our government is not, as we say, tyrannical, nor acting on whim or caprice. We boast of it as being a government of *laws*. But how can it be such, unless the laws, while they exist, are *sacredly* and *impartially*, without regard to popularity, carried into execution? What, sir, shall judges discriminate? Shall they be permitted to say, "this law I will execute, and that I will not; because in the one case I may be benefited, in the other I might make myself enemies?" And would you really wish to live under a government where your laws were thus administered? Would you really wish for such unprincipled, such time serving judges? No, sir, you would not. You will with me say, "Give me the judge who will firmly, boldly, nay, even *sternly*, perform his duty, equally uninfluenced, equally unintimidated by the "*Instantis* vultus tyranni," or the "ardor civium prava jubentium!"—Such are the judges we *ought* to have; such I hope *we have and shall have*. Our *property*, our *liberty*, our *lives*, can only be protected and secured by *such judges*. With this honorable court it remains, whether we *shall have such judges!*

The remaining part of this charge states, that my honorable client "betrayed an indecent solicitude for the conviction of the accused, *unbecoming* even a *public* prosecutor, and as highly disgraceful to the character of a judge, as it was subversive of justice!" I am not certain, sir, whether I exactly know what is here meant by a *public* prosecutor. If thereby is meant the

Digitized by Google

public officer, who prosecutes those charged with being guilty of crimes against the public, I am indeed sorry to find that those officers, so necessary, are holden by the house of representatives of the United States in so incorrect a point of view. I deny, sir, the propriety of the remark; and must be permitted to rescue the *public prosecutor* from a remark so derogatory. *He* is as much the protector of innocence, as the avenger of guilt; his duties are as clearly marked as those of a judge. They have both one common object in view, though acting in different characters. The prosecutor and the judge are *equally* bound to shield the innocent, and to punish the guilty. The prosecutor does the same benefit to his country by saving the innocent from punishment, as by preventing the guilty from impunity. Neither the judge nor the prosecutor ought to *attempt* injuring *innocence*. It is equally the duty of both to punish *guilt!* Such, sir, are my ideas. Such, sir, I have ever understood the duties of an *office*, which I have held in the state of Maryland, for twenty-seven years or more; and if my conduct had not been during that period, consonant to these sentiments, I should indeed feel myself degraded and dishonored.

I have now, Mr. President, gone through the observations, which have appeared to me necessary upon the four first articles. If I have been thought tedious my apology is the respect I feel for the dignified source from which these charges have proceeded;—from my inability to decide, which of the charges the honorable managers will most rely upon, in their conclusion; and the consequent necessity of dilating upon them all; sensible of the extreme danger, that for want of exertions which indeed require greater abilities than I am able to bring into action, erroneous impressions should remain in any instance upon the minds of this honorable court, in a case of such public magnitude, and in which my honorable client is so deeply interested, for his sake—for the sake of my country, I have felt it a sacred duty to exert those few talents which providence hath been pleased to bestow upon me!

Digitized by Google

[It was now five o'clock, when Mr. Martin, informing the senate, he had not breakfasted that morning—and had not during that day taken any refreshment of any kind, except two glasses of wine and water;—that the fifth and sixth articles yet remained to be investigated by *him*, as being altogether of a *legal nature*; and that he felt himself too much exhausted to proceed—solicited the indulgence of the court to permit him to conclude on Monday, which was granted, and the court accordingly adjourned.]

Monday, *February* 25, MR. MARTIN proceeded as follows:

After having returned my very sincere thanks to this honorable court for their polite attention on Saturday, in giving me time to this morning, I will now proceed to the further investigation of the case, in which we are engaged. But before I call your attention to the fifth and sixth articles of impeachment, permit me to notice some few points that I find had been unattended to by me on Saturday.

When a witness (Mr. Rind) who had been in some degree concerned in printing The Prospect Before Us, appeared at the trial of Callender to give evidence against him, we are told judge Chase assured him that he might be under no apprehension from giving testimony, for that he should not be prosecuted on account of any thing he should disclose on that trial.

What is the fact from the evidence? Mr. Rind, it seems, was summoned as a witness,—he came forward without any objection on his part, to give evidence.—It was then that Mr. Hay, in order to throw impediments in the way of the prosecution, undertook to interfere with the witness of the United States, and to tell him that he was not obliged to give testimony, as it might criminate himself.—The judge replied it was very true, but that the court would take care the witness should not be prosecuted on account of any thing he should disclose in his evidence, which might affect himself.—By this the court only meant that they would not institute any criminal prosecution against the witness, and if any indictment should be found against him

Digitized by Google

grounded on the testimony thus given by him, they would interfere with government to procure a *noli prosequi*, or pardon—and on these conditions, and under such promises, it is a most usual practice to introduce associates and accomplices to give evidence for the conviction of other and greater criminals.—But this is suggested to have been improper in the judge;—and one of the witnesses, the present attorney general of Virginia, has on his examination rather hazarded the idea, that any interference of the nature in question ought to have been by the United States attorney for that district, and not by the court.

The gentleman is mistaken.—In Great-Britain when an accomplice is produced to be a witness, his production, and the security he hath against prosecution on account of any thing which he may disclose having a tendency to criminate himself, is the act of the court and not of the public prosecutor, except so far as it is done under the direction and with the court's approbation. To support this position I will again turn to M'Nally, p. 203.

"The admitting an accomplice as a witness for the crown, is not a matter granted by the *court* as of course, but depends upon the question, whether the indictment can be found, and supported without his evidence."

As in the king against Robert and William Luckhurst, Maidstone, Lent assizes, 1798.

Counsel for the crown moved, that Avery, an accomplice, might be brought before the grand jury to give evidence on a bill of indictment.

Justice Buller said it was not a motion of course, and he desired the counsel to read over his brief, and certify that there was not sufficient evidence to convict without the testimony of the accomplice, otherwise *he would not* allow the motion; because it might be the means of letting off the worst offender, and punishing those to whom otherwise, according to circumstances, mercy might be shewn, and he instanced a similar case, which happened at York assizes.—The counsel then stated that this offender had been before admitted king's evidence against the others by the *committing justice*. Bul-

Digitized by Google

ler said that *he* would not pay any regard to that, because it ought not to be in the power of a justice of the peace to say, who ought and who ought not to be admitted king's evidence. The counsel thereupon said that on reading the indictment and his brief, he thought the accomplice ought to be admitted as evidence; and *his motion was granted.*" That is by the *court.*—— This authority clearly shews that in England it is considered the province of the *court* to decide when, and on what terms accomplices shall be introduced as witnesses; and such has been the uniform practice in Maryland.

And here let me observe before I quit this subject, as to Mr. Hay's conduct, that although this witness came forward voluntarily to give testimony, without making any objection on his part, Mr. Hay, to obstruct the prosecution, *officiously* interfered as far as he could, to deprive the United States of the testimony necessary to convict the offender, and to dissuade the witness from being sworn. A conduct, I confess, I cannot but view as being at least highly censurable, yet, sir, my honorable client suffered it to pass without even the smallest reprimand! This did not shew a disposition, on the part of judge Chase, to be captious, even with Mr. Hay.

There was another part of the testimony I omitted to notice; I will now do it, lest the gentleman who comes after me might make the same omission. It has been suggested by two of the witnesses, that the court, in one instance, used the word "we," in the plural number, as *identifying* the court with the prosecutor of the United States. Mr. Hay has stated it to have been on the following occasion; when the counsel for Callender reproached the court with being guilty of partiality, in requiring the questions by them propounded to Col. Taylor to be reduced to writing, although the court had not made a similar requisition of the prosecutor. The court in reply, observed, "the attorney when he opened his case, stated what he expected to prove; *but though he did* we *were not obliged to.*" He was asked if he was satisfied as to the correctness of

Digitized by Google

these expressions, he replied in the affirmative, and being taken down as I have now introduced them, and read to him, he adhered to them. Some mistake there must be, for the words so stated are destitute of sense or meaning. " But though he did we were not obliged to." To do what? I presume, to have compelled him to give us his questions in writing.

The sense then must have been, that as the attorney had disclosed what he meant to prove, and as there was no doubt of the propriety of the evidence, therefore they, the court, were not obliged to require of him to put his questions in writing. This construction reduces the answer to common sense and propriety, and frees the answer from obscurity and from censure. Mr. Nicholas thinks the word " we" was used in one instance by the court, as understood by him, in the same incorrect manner, as identifying the court with the attorney, but not at the time, or on the occasion to which Mr. Hay alludes; he however is incapable to specify at what time, or on what occasion. I ask, sir, upon such evidence so uncertain, so vague, so unsupported, can any criminality be fixed, as to this part of the charge, upon my honorable client?

Indulge me, sir, with a few remarks on certain private and social conversations, which it seems have taken place between the judge and some others, and which though perfectly innocent of themselves, have been pressed into the service of this prosecution, and attempted to be distorted into criminality,—and I will then quit this part of the charges.—A very worthy and respectable gentleman, with whom I have long been acquainted, (John T. Mason, Esq.) has been called upon to disclose a jocose conversation, which took place between him and my honorable client, a few days before he went on to Richmond, to hold the court at which Callender was tried. On that occasion he tells us, judge Chase informed him that he was going to hold the court at Richmond, and that he was determined to teach the Virginia bar the difference between the liberty and the licentiousness of the press. That as to himself, there was no person a greater friend to

Digitized by Google

its real liberty, nor a more decided enemy to its licentiousness. Judge Chase further observed that he was in possession of a copy of The prospect before us, which *I had given to him*, and said *either* that if the state of Virginia was not totally debased, or, that if there was an honest jury to be found in that state, but Mr. Mason thinks the first, he would bring Callender to punishment. Mr. Mason has declared the conversation was open and public, in the presence of a number of gentlemen, perfectly jocular, and in great good humor, and it is proved the conversation was introduced by Mr. Mason himself, whose facetious talents are so well known. That gentleman has declared that it was painful to him to be obliged now to disclose what then passed. Nor can any person doubt it;—or that nothing but a sense of the obligation he owes to his country, when thus called upon to obey the claims society has upon him, could have induced him thus to disclose the particulars of this sportive and facetious conversation, introduced by himself, to gratify the views of any person, who would wish to turn it to the disadvantage of my honorable client.

But, sir, I will ask, in all this what is there that fixes any criminality on judge Chase, or which indicated on his part a disposition to oppress? It was a fact notoriously known, that the bar of Virginia, in general did, or at least professed to, consider the sedition law unconstitutional, as *unduly* restraining the liberty of the press, that great palladium of our rights. On the contrary, my honorable client with many other respectable characters, legal and other, considered it as a wholesome and necessary restraint upon its licentiousness, and believed that such restraint was the best security for the preservation of its liberty. And on this subject let me introduce the authority of Dr. Franklin, himself a printer, and as great an advocate for the liberty of the press, as any reasonable man ought to be. He has declared that unless the slander and calumny of the press is restrained by some other law, it will be restrained by club law. The sentiment, sir, is just. If gentlemen cannot find in the laws of their country a protection from

Digitized by Google

that profligate conduct of printers, which is at this time so common, or cannot obtain from the laws of their governments ample punishment against their base calumniators, they will become their own avengers. And to the bludgeon, the sword or the pistol they will resort for that purpose. But to return to my client, it was his knowledge of the prevailing ideas of the Virginia bar that induced him to use expressions which amounted to no more than his strong sense, that they had erroneous opinions as to what was the true liberty of the press, and did not properly distinguish between its liberty and its licentiousness.

And as to the determination he expressed that he would bring Callendar to punishment, Mr. Mason has declared that every thing the judge said on that subject was predicated upon the supposition, that Callender was, in reality, the author of The Prospect Before Us.

There was nothing then personal as to Callender, but only an honest indignation expressed against a vile libeller, whomever he might be.

The judge had in his hands one of the most flagitious libels ever published in America,—a case in which there had been the most impudent and daring violation of a law of the United States;—he considered it his duty to put the law in force against such an offender. And was it not? Yes, sir, if a judge, *either of his own knowledge, or by information derived from a respectable source*, has reason to believe the laws of his country have been violated, particularly in cases of magnitude, it is his *sacred duty* to recommend to the grand jury an examination into such crimes, and to endeavor to bring their perpetrators to due punishment. I, sir, disclaim the idea, that a judge shews a want of impartiality because he is desirous to see *guilt* punished.—I, sir, have no idea, that our judges should be, like the gods of Epicurus, lolling upon their beds of down, equally careless whether the laws of their country are obeyed or violated, instead of *actively* discharging their *duties*. Judge Chase went to Richmond determined to enforce the laws of his country: it was an

Digitized by Google

honest determination! He might, it is certain, under the frivolous pretexts used for that purpose, have continued the cause to another term, he might by so doing have left the odium of enforcing this obnoxious law to be incurred by some other of the judges;—by so doing my honorable client might have avoided the obloquy to which he has been exposed on account of this trial, and this impeachment as far as it is founded thereon. But had he so done, in my opinion, he would been *guilty of a cowardly dereliction of his duty.*

Mr. Triplet has also been introduced to prove casual conversation in the moments of unsuspecting sociality and levity. He it seems travelled in the public stage with Judge Chase to Richmond—On the second day of their journey, having formed an acquaintance during that time, some conversation being introduced relative to Callender, Mr. Triplet informed the judge that Callender had, when he first came to Virginia, been taken up in Berkeley county as a vagrant——and judge Chase replied "it is a pity that they had not hung the rascal." And this is introduced to prove that the judge left Baltimore with a predetermination to oppress and do injustice to Callender!

I have, sir, heard, I believe, more than one hundred of the most respectable gentlemen of all political parties use similar expressions, not only when speaking of Callender, but also of some other printers: But these expressions I only considered as marking their disapprobation of the conduct of those printers, not as a proof they would be guilty of injustice towards them, or that they would do them any unauthorized injury.—Triplet had in the stage informed my client that he had never seen Callender;—the judge meeting him at the door of the tavern, where they both lodged, as he came from court, the day on which the bench-warrrant issued, observed to Triplet, "that the marshal had gone after Callender, therefore that he probably would have the pleasure of seeing him,"—and a day or two after informed Triplet that the marshal had returned without Callender, and he was afraid they should not catch the damned rascal that court.—Triplet has told us he boarded

Digitized by Google

with judge Chase at the same tavern six days; they were travelling together three days, during this whole time of nine days, such only are the scraps of loose, idle conversation, which have been picked up and brought forward as indicating a hostile and oppressive principle towards Callender.

As to the word "damned," which has been introduced in the conversation, however it may sound elsewhere in the United States, I cannot apprehend it will be considered *very* offensive, *even* from the mouth of a judge on this side of the Susquehanna;—to the southward of that river it is in familiar use, generally introduced as a word of comparison,—supplying frequently the place of the word "very,"—not confined to cases where we mean to convey censure, but frequently connected with subjects the most pleasing; thus we say indiscriminately a very good or a damn'd good bottle of wine; a damn'd good dinner, or a damn'd clever fellow.

But, sir, what must at once efface every pretence of a disposition hostile and oppressive towards Callender on the part of judge Chase is, *the mildness of the punishment inflicted.*

I now, Mr. President, shall proceed to the fifth and sixth articles of impeachment.—These relate to the process issued against Callender, and to the time at which it was made returnable. By the fifth article my client is charged with having "awarded a capias against Callender by which he was arrested and committed to close custody, although it is provided by an act of Congress, passed the 24th day of September, in the year 1789, that for any crime or offence against the United States the offender may be arrested, imprisoned or bailed agreeably to the usual mode of process in the state where such offender may be found, and although it is provided by the laws of Virginia, that upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer at the next court."

The criminality alledged against my honorable client by this article as well as the *sixth*, consists in his vio-

Digitized by Google

lation of a law of the state of Virginia, by which it is supposed his conduct ought to have been regulated.

We find from the evidence in this cause, that the legal characters of that state, whether on the bench or at the bar, cannot agree among themselves as to what is the law of that state,—and that the practice has been and continues to be variant in various counties in Virginia. Nay, it is proved that two highly respectable legal characters who successively held the office of attorney general, (Col. Innes and Gen. Brooke,) were applied to by one of their deputies, and declared themselves incapable to decide what ought to be the practice, or in other words, to decide in which cases a summons ought to be issued and in what cases a capias was the proper process. Surely then judge Chase, who was a stranger in Virginia, cannot be considered criminal nor even subject to reproach for not understanding a law of that state, the true construction of which remains even now a question, upon which the Virginia judges and lawyers find it impossible to agree.

Upon these observations I think I might safely rest my client's defence, as to this charge—and even consent that he shall be convicted and removed from office, whenever they shall agree among themselves upon the construction of their law,—provided it should be against us.

But, sir, I must request to be indulged in an endeavor to investigate this subject which appears so intricate, and to try if I cannot throw such lights upon it as possibly may be serviceable to the gentlemen of the bar of that state, whose law is in question; and in this attempt I feel a confidence, that I shall be at least able to satisfy this honorable court, judge Chase, even if bound to conduct himself according to the laws of Virginia, which I utterly deny, and shall endeavor to disprove, acted not only free from criminality, but with the strictest propriety.

I shall lay down as a position, which will not be controverted, that in all *personal* actions, civil or criminal, instituted against individuals in Virginia as well as in Maryland, the process to bring them in to answer to

Digitized by Google

the suits is, and hath always been a capias, or process to arrest the body,—except so far as by legislative acts of the respective states, the law hath in certain cases been altered and *other* process directed.—And I mean to shew that every case in Virginia, civil or criminal, and some there are of both, where a summons is the legal process, arises out of the legislative provisions, that is the acts of assembly of that state. And by examining the different acts, which have been passed upon this subject, we shall be able to ascertain, what are the cases, and the only cases, wherein a summons ought to be issued. I have, sir, before me the laws of Virginia antecedent to the American revolution; it is the edition printed at Williamsburg, by *Rind*, *Purdie* and *Dixon*, in the year 1769. It appears, sir, that until the year seventeen hundred and forty eight, suits might be brought in the county court for any sum exceeding twenty five shillings current money, or two hundred pounds of tobacco: and actions of trover or detinue without regard to the value of the article converted or detained, in all such actions a capias ad respondendum was the first process issued, authorising the sheriff to take the body of the defendant into his custody, and have him before the court at the time when his writ was returnable—in that year a law was passed, chap. 4th—by the 26th sec. of which it is enacted, "that for the more *speedy* recovery of *small* debts, it shall be lawful for the justices of any county court to hear and determine all suits brought for any debt or demand, due by judgment, obligation, or account for any sum or sums of money or tobacco of the value of twenty five shillings current money, or two hundred pounds of tobacco, and not exceeding five pounds of like money, or one thousand pounds of tobacco, by *petition* without the *solemnity of a jury*; and where the demand shall not exceed the above mentioned sums, the plaintiff shall proceed by petition, and *not otherwise*." After directing in what manner the claim is to be set forth in the petition—the same section directs that "upon filing such petition in the clerk's office, a summons of course shall be issued returnable to the next court (the courts

Digitized by Google

were then held monthly) a copy of which, together with a copy of the petition, and accounts shall be delivered to the defendant, or left at his or her usual place of abode, ten days at least before the next succeeding court, and the same being returned executed by a sworn officer, or oath made of the due service thereof, if the defendant do not then appear, it shall be lawful for the said justice to hear and examine into the truth of the matter so complained of, and to determine the cause on the evidence produced, or to dismiss the petition as to them shall seem just. And if the defendant do appear, he shall forthwith put in such answer or plea thereto as will bring the matter of complaint in issue thereupon: Or if he fails to plead, the court shall instantly proceed to hear and determine the cause in a summary way upon such evidence as shall be given, and shall give judgment according as the very right of the cause and matter in law shall appear unto them without regard to form or want of form, &c."

By the 22d sec. of the same law, it is enacted "that when any person entitled to an action of trover or detinue shall set forth the value of the thing demanded to be *under the value of five pounds*, in a *petition* to any county court, a *summons* shall issue, and the same proceedings shall be had as in cases for the recovery of small debts." But for the recovery of *any penalty* for the *breaches* of the *penal laws* of the then colony, no change was made as to the mode of instituting the action.—The process of capias to arrest the offender, the right of trial by jury in such actions,—as to these subjects, the law was left as before: and yet actions of this nature were under the consideration of the legislature; for we find in sec. 23, of the same law, "that for the easier, speedier, and better advancement of justice in obtaining judgments in any such suit or action, where the penalty sued for shall not *exceed five pounds*, current money, or *one thousand pounds* of tobacco, if in such suit any *demurrer* shall be joined and entered therein, in any court of record within said *dominion*, the judges shall proceed and give judgment according to the very right of the case, and as the matter of law shall appear

Digitized by Google

to them, without regarding any imperfection, omission or defect, &c. except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding, &c. And that if any *verdict should be given* in any such action or suit, in any court of record in said dominion, the judgment thereupon shall not be staid or reversed for or by reason of any default in the form or want of form, of any writ, &c. any law, statute or usage to the contrary notwithstanding."

And here, sir, it may perhaps be proper to observe, that in Virginia, at least before the revolution, the *penalties* inflicted for the breach of their *penal* laws, were commonly by the acts themselves directed in what mode to be recovered, which mode was almost universally directed to be "by *information*, bill, plaint, or action of debt, in any court of record within said dominion, wherein no essoin, protection, or wager of law, privilege or any more than one imparlance shall be allowed." [Mr. Martin turned to a variety of the penal laws to shew such were the provisions.] This honorable court will perceive that under *these provisions*, the penalties could not be recovered by presentment and indictment, as hath frequently been determined; hence the usual suits or actions resorted to in the courts of Virginia, for the recovery of those penalties from the smallest to the greatest, were *informations* or *actions of debts*. And the twenty third section which I have just read relates to such informations or actions of debt, where the penalty should not exceed *five pounds*, and to those only applies such regulations as are thereby made, which however do not alter the form of action or the nature of the process to be issued, even in those cases, but leaves the law in those respects as it was before.

However, during the same session, in their legislatorial disquisitions, they thought proper to take away the trial by jury in proceedings *by presentment*, to recover penalties not exceeding five pounds,—to give the courts summary jurisdiction in *those cases*; and to take away the process of a capias therein.—And hence hav-

Digitized by Google

ing by the first section of chapter 7, (see page 188, laws of Virginia) enabled *grand juries to present breaches* of all *penal laws* of that then colony: by the 2nd section it is thus enacted, "that when any offence or offences should be *presented by a grand jury*, and the penalty or forfeiture by law, inflicted thereon, shall not exceed five pounds current money, or one thousand pounds of tobacco, be it to the king and informer, or to the party and informer only, or appropriated to any other use whatever, such *presentment* need not be drawn up in *other form* than as the same stands *presented by the grand jury*, and thereupon the court shall order a *summons* forthwith to issue, to summons any person, so presented, to appear and answer such *presentment* at the next court, (as I have before observed, the courts were then held monthly) and shall not admit of any exception or pleading to the form or manner thereof, but shall proceed to trial, without *the formality of a jury*, and give judgment upon such *presentment*, according as the very right of the cause and matter in law shall appear to them; and if the party summoned fails to appear, the court may give judgment for the penalty."

Thus, sir, the law of Virginia remained until the revolution, and from this view it will appear that the only cases, where, in personal civil actions, the process was to be by summons, and not by capias, were where debts were claimed not exceeding five pounds, or one thousand pounds of tobacco, or property converted or detained not exceeding the same value, in all which cases the suit or action was to be instituted by *petition*, and the *court* was to decide in a *summary* manner, without the *intervention of a jury*.

And that the only case, in *criminal* proceedings, where a summons was directed to issue, is where a *presentment* hath been made by a *grand jury*, for an offence, *the penalty* whereon shall not *exceed* five pounds current money, or one thousand pounds of tobacco, which *presentment* need not be drawn up in any *other form*; and on which presentment the court was to decide in a *summary* manner, without the *intervention of*

Digitized by Google

a jury.—This honorable court will also perceive, that the provision of this act directing summons to issue in the case I have stated can only apply to presentments made under the local, penal laws of Virginia, where the penalty is restrained to a sum not exceeding five pounds current money, or a thousand pounds of tobacco, and cannot extend to presentments for offences at *common law*, such as assaults, riots, libels, &c. since in all such cases the courts have a discretionary power to fine what sum they think reasonable, and therefore may fine beyond five pounds current money, or a thousand pounds of tobacco.—Nor doth the provision extend to any case even under the penal laws of Virginia, where the court may punish by *imprisonment.* Upon this examination of the subject, it appears that until the time of the American revolution, according to the laws of Virginia, a capias remained the proper process in all personal civil actions, except where the claim was for money or debts due not exceeding five pounds current money, or one thousand pounds of tobacco—or where, in detinue or trover, the plaintiff laid the value of the property not exceeding the aforesaid sum—and that in *criminal* cases a capias remained the proper process in all proceedings for offences at common law ;—and for all offences against the acts of the state of Virginia where the court may inflict a fine of more than five pounds current money, or which were punishable by imprisonment. Having thus shewn what was the law on this subject at the time of the American revolution—I have, sir, to examine what changes and alterations have been made therein since that period.

The first law made since the revolution was passed in the year 1792, and is to be found in the edition of the Virginia laws, published by Augustine Davis, in the year 1794, page 96 ;—the 37th sec. increases the amount of the debt, which may be recovered by petition in the county, city, or borough court, to a sum not exceeding twenty dollars, or eight hundred pounds of tobacco, directing process to be by summons and the mode of procedure for recovery of the same as for

Digitized by Google

recovery of small debts before and at the time of the revolution.—The 38th sec. also encreases the value of the property where in trover and detinue, petition may be filed and proceedings be had as before the revolution, to the sum of twenty dollars, or eight hundred pounds of tobacco.

In the same year an act was passed, to be found page 106, by the 6th sec. of which it is enacted, "that in a *presentment* to the county or corporation courts, if the penalty of the offence exceed not five dollars, or three hundred pounds of tobacco; or to the district court, if the penalty exceed not twenty dollars, or one thousand pounds of tobacco, *no information* thereupon shall be filed, but a *summons* shall thereupon be issued against the defendant to answer the said *presentment*, and such summons having been served upon him, or a copy thereof having been left at his usual place of abode, and if he doth not appear, judgment shall be given by the court against him for the penalty, and if he doth appear, the court shall in a *summary way*, without the *intervention of a jury*, hear and determine, &c."—And by the 37th sec. of chapter 74, page 113, there is a general provision, that where no *presentment* may be made, yet where the penalty incurred by the breach of any penal law shall not exceed twenty dollars, or eight hundred pounds of tobacco, the same may be used for, and recovered in the manner, directed by law for debts of like amount.

This clause was designed to prevent informations or actions of debt to be originally instituted for the recovery of penalties not exceeding that sum, where no presentments should be made, and to direct a procedure by petition in which also the process must be a *summons*, and the decision by the court in a summary manner.

One other provision, and one only, hath been made for issuing a *summons*, this is found in the twenty fourth section of the same act, and runs thus. "No information for a trespass or misdemeanor, shall be filed in any court, but by express order of the court entered on record, nor unless the party supposed to be

Digitized by Google

culpable shall have failed to appear and show good cause to the contrary, having been required to do so by a *summons*, appointing a convenient time for that purpose, served upon him, or left at his usual place of abode."

These are the only acts of the Virginia legislature I find on this subject—I believe there are no others.—If there are any more, the honorable managers will be so obliging as to point them out; but presuming that they can produce no further provisions, what is the result of this investigation? That even at this time, the only instances in personal civil actions where summons is the proper process, are where the demand for money due—or on account of trover or detinue doth not exceed twenty dollars, or eight hundred pounds of tobacco, in which case the proceeding is to be by petition and the court determine in a summary manner without the intervention of a jury:—And in criminal cases, or for recovery of *penalties* for the breach of their *penal* laws, the only cases where a summons is the regular process are where the actions are instituted by *presentment of a grand jury*, on which presentment no information is to be filed,—or without such presentment by *petition*, for the recovery of penalties not exceeding twenty dollars, or its correspondent value in tobacco; which cases can only arise under the acts of assembly of Virginia, and not where the offences are at common law—nor in any case even under the laws of Virginia, where punishment may be by imprisonment—that the only additional instance, in which a summons is to be used in a criminal case, is where application is made for an information—and there it is directed in order that the party may have an opportunity to shew cause why an information shall not be ordered against him; but even in this case, if the information is ordered, a capias is the process to bring the party to answer the charge contained in such information,—as it *remains to be in every other criminal prosecution or suit, except those which I have already particularly designated.*

I will now, sir, turn to the law of the state of Virginia, with the violation of which we are charged; but

Digitized by Google

first let me premise it is most erroneously stated in the article of impeachment, how this hath happened is not for me to say, but such is the fact, the article of impeachment sets forth, that " it is provided by the laws of Virginia, that upon presentment by any grand jury of an offense not capital, the court shall order the clerk to *issue a summons* against the person or persons offending to appear, &c." whereas in truth the words of the law are, " upon presentment made by the grand jury of an offence not capital, the court shall order the clerk to issue a summons *or other proper process* against the person or persons, &c." (See page 112, sec. 28, same edition, laws of Virginia.)

Thus then the very law points out that upon such presentments a summons is not in all cases a proper process, but that a summons is to issue, or *other proper process*, according to the nature of the offences presented. That is, as I have already shewn, a *summons* is to be issued where *presentments* are made for a violation of the penal laws of their state punishable by a *fine of not more than twenty dollars*, or its corresponding quantity of tobacco, *nor by imprisonment;* but in all presentments for *offences at common law*, or for breaches of *their penal laws* punishable by *fine beyond twenty dollars* or *by imprisonment*, in such cases the clerk *must issue a capias*, that being the *proper process.*—And upon these principles it has been determined in the circuit court of Columbia, sitting at Alexandria, acting under the laws of Virginia, that on presentments for assaults and battery, and other common law offences, a capias is the proper process to be issued; and this determination has been made while a gentleman of great legal knowledge, a native of Virginia, and who received his legal education in that state (John Thompson Mason, Esq.) prosecuted in that court for the United States, upon whose application, I presume, the determination was made.

I will now examine the law of the United States, passed the 24th September, 1789, entitled " An act to establish the judicial courts of the United States," section 33, " And be it further enacted, That for any

Digitized by Google

crime or offence against the United States, the offender may by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against such offenders in such state, and at the expence of the United States, be *arrested*, and *imprisoned* or *bailed* as the case may be, for trial before *such court* of the United States, as by this act has cognizance of the offence: and copies of the process shall be returned, as speedily as may be, into the clerk's office of such court, *together with the recognizances of the witnesses for their appearance to testify in the case*, which recognizance the magistrate, before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or of the witnesses shall be *in a district other than that in which the offence is to be tried*, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the said district to execute, *a warrant* for the removal of the offender and the witnesses or either of them, as the case may be, to the district into which the trial is to be had. And upon all *arrests* in criminal cases, bail shall be admitted, &c." This is the law of the United States mentioned in the fifth article as governing the question now before us, the basis on which this article is founded. The least examination will shew that it provides only for the manner in which offenders shall be arrested under warrants issued by the judicial officers of the United States or of the different states upon complaint made to them, in order that such offender may be bailed or committed, and witnesses bound over to the approaching proper courts, that the offences may be enquired of by a grand jury; and hath no relation to the manner in which process shall be issued *by a court* to bring in offenders to answer to presentments which are depending in the court. And a similar provision for arrests in such cases is made by the acts of assembly of Virginia, in that state. [See the 17th sect. of chap. 67, page 93, same edition of Virginia laws.]

Digitized by Google

But that the aforesaid act of Congress can in no manner relate to or be regulated by any law of Virginia, directing a summons to be issued as the proper process, appears clearly from this, that the offender is to be *arrested* and imprisoned or bailed, according to the nature of his offence; but no person can be *arrested* on *process of summons*, or on such process be compelled to give bail, under pain of imprisonment. This can only be done when a *capias*, or a similar process, such as a magistrate's warrant, or the warrant of a court, called a bench warrant, is issued!—And here, sir, let me explain what is meant by a *bench warrant*. When a presentment is made by a grand jury against a person not imprisoned, nor recognized, process is issued to arrest the offender and bring him before the court then in session; as when an application is made to a judge or justice out of court, and oath made of an offence committed, it becomes the duty of such judge or justice to issue *his warrant* to take the offender into custody, and thereby secure his appearance at court to answer to any presentment which may be made against him; so when a presentment is made by a grand jury of any offence, that presentment being made by the oath of not less than twelve of the grand jurors, founded also on the oath of witnesses, it authorises the court upon this proof, that an offence has been committed, to issue process commanding the sheriff to arrest the offender presented, and bring him before them, to be bailed or committed according to the nature of the crime with which he is charged. This process is what in Maryland is called a *Bench warrant*. It differs from the warrant issued by a judge or justice in as much as this last is directed to a constable, the other to a sheriff—It differs from the common capias only in this, that the bench warrant is made returnable immediately, that is, during the session of the court, whereas what is commonly called a capias is returnable to the succeeding term. And in Maryland it is the constant practice of our courts, whenever presentments are made against persons not in confinement nor under recognizance, to issue such process in *all cases*, from the highest to the

Digitized by Google

lowest offences, in order to secure the persons presented.

I have said, sir, that the law relied on by the house of representatives in support of this article, doth not relate to process issued on *presentments made* in the courts of the United States; and as a further proof of this, I now refer this honorable court to the fourteenth section of the same law, where it is enacted "That all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and *all other writs* not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law." By this provision a power is given to the courts of the United States to issue such process as in their discretion they shall think best, so that it be consistent with the general principles and usages of law. And the act of the United States entitled "An act in addition to an act to establish the judicial courts of the United States, passed on the 2d March, 1793," in its seventh section has the following provision, to wit, "that it shall be lawful for the several courts of the United States, from time to time, as *occasion may require, to make rules and orders* for their respective courts *directing the return of their writs and processes*, the filing of declarations and other pleadings, the taking of rules, the entering and making up *judgment or default*, and other matters in the vacation and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary *for the advancement of justice*, and especially to that end *to prevent delays* in proceedings." This act gives the courts of the United States full power to regulate the return of process as to time and every thing else—the former law gave them the power of issuing *such process* as in their judgment and discretion they should think most proper—on these subjects then they are uncontrolled, unrestrained by the laws or the practice of any state, or state courts. The courts of the United States having this power, can only exer-

Digitized by Google

cise it as the case comes before them, they then determine what is right and proper, and that becomes a precedent in similar cases, and thus it was the court acted in the case of Callender, as to the process issued and the time of its return, and was perfectly justified by the laws of the United States in so acting.

The sixth article alledges that by the laws of Virginia it is provided, that in cases not capital the offender *shall not be held* to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall be made, and yet that my honorable client with intent to oppress and procure the conviction of Callender, did at the said court at which *he* was presented, rule and adjudge him to trial, during the term at which he, Callender, was presented and indicted, and this, notwithstanding the provisions of the thirty-fourth section of the aforesaid law of the United States, mentioned in the fifth article, which provides "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States where they apply."

In answer to this charge, sir, permit me to state there is no law of Virginia that declares the offender, presented for an offence not capital, *shall not be tried until the succeeding term;* it is only an inference, which that honorable body, who formed the articles of impeachment, have made from the supposition that in all such cases a *summons only* could be issued, returnable to the succeeding term, and in consequence that the offender could not be compelled to go to trial before the succeeding term.

But, sir, I have already shewn that summons was not the proper process in Callender's case; that the laws of Virginia were not in the least degree operative on either the process to be issued, nor the time or the manner of its return, but that the one and the other was solely in the power of the court, vested in them by the laws of the United States, urestrained by any law of the state of Virginia. Thus then the premises failing

Digitized by Google

from which the inference was drawn, the inference of course must be rejected. Thus then the court being unrestrained by any law of Virginia, or by any inference drawn therefrom, not only had a right to try Callender the same term he was indicted, but were bound in duty so to do, unless there was some good cause to justify the delay. When a presentment is made, there is such evidence that a crime has been committed, as to authorise the court, nay to make it their duty (as I have before observed) to issue process to *arrest* the criminal to prevent his escape from justice; our laws are not founded on the principle that the offender may have an opportunity to escape and elude justice; and hence it is that a grand jury is sworn to secrecy as to their deliberations, lest those offenders against whom enquiries are making, getting information of that fact may run off before they can be secured. And when the criminal is arrested and brought into court, it is the duty of the court both as to the criminal and the public to have the cause decided as soon as can be consistent with justice. And now let me turn to the 34th section of the judiciary law of the United States which is introduced in this article and on which reliance is placed by that honorable house which hath prepared these articles—it is as follows: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at *common law* in the courts of the United States in cases *where they apply*." I shall not, sir, enter here into a discussion whether a prosecution for the violation of a penal law of the United States can be with propriety within the meaning of this act, called a proceeding at common law. Nor shall I, sir, rely as I might do upon the observation that they are only to "be regarded *in cases where they apply*," and that it is the court and the court only who are to determine in what cases they do apply; in doing which they are only required to exercise impartially their legal discretion; but I shall ask whether this law in any manner relates to the process to be issued to bring into court the party to the suit antecedent to the *trial*, to

Digitized by Google

compel him to appear in order that a trial may be had? I presume not. The provisions for that purpose are to be found in the 14th section of the law of September 24th, 1789—and in the 7th section of the law of March 2d, 1793, which I have already cited, and which regulate not only the issuing but the returning of process to bring the party into court, to answer to the charge whether civil or criminal. According to my judgment, sir, the law in question means, only to declare that the rules and decisions of the state courts in any questions as to the right of the parties, shall be respected and attended to in similar questions, which may come into controversy in the courts of the United States, in their respective districts or circuits, as far as they shall be thought to apply, in cases at common law.—That is if two cases exactly similar are in litigation, as to civil rights, the one in the state court, the other in the district or circuit court held in the same state, there ought to be in each case the same decision; and that where the law in the case had been settled by antecedent state decisions, the judges of the United States should respect those decisions.—And also that when the courts of the United States try a cause in any district or any circuit, the rights of the parties are to be decided according to the laws of the states under which rights were acquired, as settled by the legal decision of the state courts, where decisions have been had.—To exemplify my ideas, if the courts of the United States have on any occasion to determine, either immediately or incidentally, a right arising under a devise of lands in Maryland, they must determine the devise void, unless the will was attested by three witnesses. But if the devise was of lands in Virginia, the courts would be obliged to determine the devise good, although attested in a different manner.—So also the obligation contracted by the execution of a promissory note is different if executed in Virginia, from what it is, if executed in Maryland.—Upon actions therefore which may be instituted in the courts of the United States in such cases, these courts ought to consider what are the rights of the parties according to the laws of the states where the tran-

Digitized by Google

sactions took place—and where there have been decisions of the state courts upon the subject matter, or any decisions, which may be considered as having a bearing on the question, the United States' courts are to regard such decisions as far as they think they are *applicable*.

Thus, sir, I flatter myself, that I have upon the fifth and sixth articles shewn, that there was no law of Virginia by which the conduct of the judge was to be regulated,—and that even if the laws of that state had been operative, they have not been, according to their true construction, in any degree violated.

But surely it can never be seriously contended, that where a gentleman is appointed a judge of the United States, he is thereby expected to become perfectly acquainted with all the local laws, usages and decisions of every separate state in the union—no such judge by any possibility can be had—however great the legal knowledge of any gentleman, it has been generally confined to the laws, to the practice, the judicial proceedings of his own state, and to the common law, as there used and introduced. From the perfect conviction of this truth, the district judge is appointed an inhabitant of the state which composes the district—he is supposed to know the particular laws, usages and decisions of his state.—It is to him, or the district attorney in his absence, the judge of the supreme court, when he goes to hold the circuit court, is expected to apply for information, as to what relates to these subjects,—and thus we find judge Chase correctly acting,—for the district judge being absent when Callender was presented, we find my honorable client consulting with the district attorney, whose political principles certainly did not lead him to wish to oppress Callender,—and also with the clerk of the district court, who is himself a gentleman of legal knowledge, and a prosecutor in one of the state courts in Virginia,—and it was under their advice and with their approbation that the process was issued, of the nature used, and returnable in the manner we have seen.—In fine, sir, it is impossible for the judges of the supreme court to have even a general

Digitized by Google

knowledge of the particular state laws and practices, and if in consequence of that want of knowledge they were to be subject to impeachment, you would not be able to prevail upon any respectable character to accept the appointment. But I do not apprehend, sir, that the honorable managers place much reliance at this time on these two articles. Nor do I believe the honorable house of representatives would have either adopted them or any of the articles, which have been brought forward against judge Chase, had the same evidence been before them which hath been produced to this honorable court.

In saying this I do not mean in the slightest degree to censure that honorable body, they were acting as a grand inquest of the nation—they only had, and only could have before them *ex parte* evidence. On the evidence which they had before them, I shall not suggest but what there was sufficient foundation for bringing forward the charges:—But these charges have been patiently discussed—a mass of evidence hath been produced here, which they had not, and after this full investigation, the honorable members who impeached him, and who have regularly attended his trial, I doubt not, are perfectly satisfied that he ought to be acquitted, and will rejoice at that acquittal.

Before I conclude, let me add one other proof that the framers of the constitution never intended that juries should have any power to decide the law contrary to the instructions of the court, much less to decide upon the *constitutionality* of a law. By the 2d section of the 3d article of the constitution of the United States it is provided, that in all cases to which the judicial power applies, except cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, "the supreme court shall have *appellate jurisdiction*, both as to law and *fact*, with such exceptions and under such regulations as Congress shall make."

Thus therefore it is in the power of Congress to authorise, in all such cases, an *appeal* to the supreme court *even as to the fact* from the *verdict of a jury*,

Digitized by Google

and empower the supreme court to control the jury if they appear to have erred. And such was the intention of the framers of the constitution.

They assumed as a principle, that the interests of the state governments and of the general government would often be at variance, that laws passed by the United States, the most wise and salutary, might be very obnoxious to and unpopular in, some of the states—judges holding their commissions under the respective states, that is, the state judges, the framers of the constitution would not therefore entrust with the execution of the laws of the United States. They also considered that as far as juries were introduced, the jurors would be citizens of the respective states wherein the trials should be had—that they would in consequence probably partake of the interests, the prejudices and the passions prevailing in the state, and therefore might decide contrary to the direction of the judges appointed by the United States, and thereby prevent the due execution of their laws. To obviate this, the constitution has a provision for an appeal to the supreme court even from the verdict of such a jury.—Judge then whether the framers of the constitution ever contemplated giving power to counsel to argue to jurors *against the opinions of their judges—or juries to decide against such opinions!*

I have now only to return to this honorable court my sincere thanks for the patient attention with which they have indulged me on this occasion, and to express to you, Mr. President, the high sense I have of the impartiality, politeness and dignity with which you have presided during this trial.

Mr. HARPER.

IT was greatly to be desired, Mr. President, and might have been confidently expected, that in a case every way so important, where it so greatly concerns the public happines, that the decision should command the public confidence, nothing would be pre-

Digitized by Google

sented to the view of this honorable court in aid of the prosecution, except the law which ought to govern the decision, and the proofs relied on for supporting the allegations.

But it has not so seemed good to the honorable managers. They have thought proper to introduce into the discussion, the political opinions and party connections of the respondent; for the purpose of throwing a shade of doubt over his motives, and of establishing inferences unfavorable to his character. How far this conduct ought to be commended, it is not for me to decide. My confidence in the justice and discernment of this honorable court forbids me to apprehend that it can be successful.

But since these opinions and connections have been introduced, permit me to use them for a different purpose.

The duty imposed on judges is at all times delicate: and in criminal cases, where life or liberty may be affected, where reputation dearer than both depends on the issue, this duty becomes peculiarly arduous and painful to an honorable and generous mind. But if there be a situation more delicate, more embarrassing than every other to such a mind, it is that of a judge sitting on the trial of a person who, from political opposition, or any other cause, may have excited hostile or angry feelings in his mind. It is then that he most fears to trust himself, It is then that he most dreads the influence of his passions, in misleading his judgment. It is then that he feels the strongest alarms for his reputation; lest he should possibly afford ground for the suspicion, that he had gratified his resentments under the semblance of executing the law.

Hence he constantly leans towards the side of the accused, and requires the clearest conviction before he condemns. Hence he rejects all doubtful or contradictory testimony, lays out of the case all little indiscretions and slight shades of suspicion; and is rigid in requiring from the prosecutors the unequivocal proof of unequivocal offences. That his enemy is in his power is always a reason for the utmost forbearance.

Digitized by Google

The fear that he may possibly be misled by his passions, is always a reason for acquittal, where doubt can exist.

Need I invoke these noble and generous sentiments in the breasts of this honorable court? No! my heart tells me I need not. I see on those benches distinguished soldiers and eminent statesmen, who have triumphed alike in the fields of politics and war, and who always disdained to tarnish their laurels by the blood or the humiliation of a vanquished foe.

If then the person now arraigned at your bar be connected with a political party in opposition to any of those who sit as his judges; if it were possible that, in promoting the views of that party, he may have excited feelings of anger or resentment in the mind of any member of this honorable tribunal; if it were possible, that any portion of the angry passions, engendered by the conflicts of party, could find a place within these hallowed walls, and could attach itself to him who stands upon his trial at this bar: the existence of such a possibility would furnish every member of this honorable court, with the strongest motives that can operate on a generous and noble mind, for leaning constantly to the side of the accused, and for pronouncing in favor of an acquittal, wherever there remains a doubt of guilt.

Attempts have also been made to enlist the sympathy of this honorable court on the side of the prosecution, and for this purpose a criminal twice convicted, who did not hesitate to risk civil bloodshed in support of political theories, and is now indebted for his life to the clemency of that government, against whose laws he armed his ignorant and misguided neighbors, is presented to view, decked out in all the ornaments which rhetoric can bestow. We, Mr. President, disclaim the aids and protest against the interference of rhetoric and sympathy. However proper in other situations, they ought to be excluded from courts of justice; whose decisions should be governed by truth and not by feeling.

Digitized by Google

But if sympathy could find a place in this tribunal, what object more to fit awake it, than that now presented at your bar!

An aged patriot and statesman, bearing on his head the frost of seventy winters, and broken by the infirmities brought upon him by the labors and exertions of half a century, is arraigned as an offender, and compelled to employ, in defending himself against a criminal prosecution, the few and short intervals of ease allowed to him by sickness. Placed at the bar of a court, after having sat with honor for sixteen years on the bench, he is doomed to hear the most opprobrious epithets applied to his name, by those whose predecessors were accustomed to look up to him with admiration and respect, and whose fathers would have been proud to have been numbered among his pupils. His footsteps are hunted from place to place, to find indiscretions, which may be exaggerated into crimes. The jests which, flowing from the gaiety and openness of his temper, were uttered in the confidence of private conversation; the expressions of warmth produced by the natural impetuosity of his character, are detailed by companions converted into spies and informers, and are adduced as proofs of criminal intention.

This cup so full of bitterness for one who has been accustomed for forty years to fill the most honorable stations in his country, he drinks to the dregs without complaining. In this sad reverse, he supports himself with a calmness, a fortitude, and a resigned dignity, which melt the hearts of those who are not his enemies, and extort the respect of those who are.

If sympathy must be excited, here let it find a nobler object. If from generous breasts it cannot be excluded, let it be turned towards

"A brave man struggling with the storms of fate,"

and greatly supporting himself under a pressure of evils the most afflicting that an elevated mind can know.

Not content with endeavoring to blow up a flame of party spirit against the respondent, and to engage sym-

Digitized by Google

pathy in the ungracious, and to her unnatural, task of aiding a criminal prosecution, the honorable managers have resorted to a principle, as novel in our laws and jurisprudence, as it is subversive of the constitutional independence of the judicial department, and dangerous to the personal rights and safety of every man, holding an office under this government. They have contended, "that an impeachment is not a criminal prosecution, but an enquiry in the nature of an inquest of "office, to ascertain whether a person holding an office "be properly qualified for his situation; or whether it "may not be expedient to remove him. But if this principle be correct; if an impeachment be not indeed a criminal prosecution, but a mere inquest of office; if a conviction and removal on impeachment be indeed not a punishment, but the mere withdrawal of a favor once granted; I ask why this formality of proceeding, this solemn apparatus of justice, this laborious investigation of facts? If the conviction of a judge on impeachment, is not to depend on his guilt or innocence of some crime alledged against him, but on some reason of state policy or expediency, which may be thought by the House of Representatives, and two thirds of the Senate, to require his removal; I ask why the solemn mockery of articles alledging high crimes and misdemeanors, of a court regularly formed, of a judicial oath administered to the members, of the public examination of witnesses, and of a trial conducted in all the usual forms? Why not settle this question of expediency, as all other questions of expediency are settled, by a reference to general political considerations, and in the usual mode of political discussion? No! Mr. President! This principle of the honorable managers, so novel and so alarming; this desperate expedient, resorted to as the last and only prop of a case, which the honorable gentlemen feel to be unsupported by law or evidence; this forlorn hope of the prosecution, pressed into its service, after it was found that no offence against any law of the land could be proved, will not, cannot avail. Every thing by which we are surrounded informs us that we are in a court of law. Every thing that we

Digitized by Google

have been three weeks employed in doing reminds us, that we are engaged not in a mere enquiry into the fitness of an officer for the place which he holds, but in the trial of a criminal case on legal principles. And this great truth, so important to the liberties and happiness of this country, is fully established by the decisions of this honorable court, in this case, on questions of evidence; decisions by which this court has solemnly declared, that it holds itself bound by those principles of law, which govern our tribunals in ordinary cases. These decisions we accepted as a pledge, and now rely on as an assurance, that this cause will be determined on no newly discovered notions of political expediency, or state policy, but on the well settled and well known principles of law and the constitution.

The honorable managers, indeed, are as much at war with themselves on this point, as with the constitution and the laws. For when they have told us in one breath, that this is merely a question of policy and expediency, they resort in the next to legal authorities, both English and American, for the purpose of explaining the doctrine of impeachment, and of proving that the acts alledged against the respondent amount to impeachable offences: thus paying an involuntary homage to truth, and furnishing an instance of the irresistible power with which she forces herself on the mind, even when most obstinately determined to resist her. Let us also, Mr. President, be permitted to adduce the authority of an elementary writer, of very high authority, on the laws of England, in support of the principle for which we contend. Woodeson in his lectures vol. 2. p. 611, treating on the law of impeachment, speaks thus; "As to the trial itself, it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevail. For impeachments are not formed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of two powerful delinquents, or not easily discerned in the

Digitized by Google

ordinary course of jurisdiction, by reason of the peculiar quality of alledged crimes. The judgment therefore is to be such, as is warranted by legal principles or precedents. In capital cases the mere stated sentence is to be specifically pronounced." Thus far this learned professor and commentator of the laws of England; and he cites as authorities for this doctrine, Selden and the state trials; the latter of which, this honorable court need not be informed, is a collection of adjudged cases in the highest courts of England; and the former a writer of great learning and very high authority, peculiarly tenacious of every principle tending to the security of public liberty, and not likely to mistake on a point so essential, as the law of impeachment.

Thus we find that even in England, where the power of impeachment is subject to no express constitutional restrictions; and where abuses of that power, for the purpose of party persecution and state policy, have sometimes been committed, and more frequently attempted; an impeachment has never been considered as a mere inquest of office, but always as a criminal prosecution, differing not in essentials from those which are carried on before the ordinary tribunals of justice; and subject to the same rules of evidence, and the same legal maxims concerning crimes and punishments: as a proceeding contrived not to alter the law, but to carry it into more effectual execution. These authorities, sanctioned by the practice of one hundred and fifty years, prove the principle for which we contend. Instances may no doubt be found in the history of that country, where these salutary principles have been disregarded, and impeachments have been converted into engines of oppression. But this abuse does not destroy or impair the principle. *That* remains as eternal as the laws of reason and justice, on which it is founded; while the abuse passes into oblivion, with the temporary interests and fleeting projects which it was made to subserve: or remains in our recollection as a sad monument, of the excesses into which frail man is hurried by his passions.

And has not this great principle of English jurisprudence, which in that country has weathered so many

Digitized by Google

storms of faction, revolution and civil war, received the sanction also of this honorable court? Has not testimony been rejected, because it was judged illegal, according to the ordinary rules of evidence? And how could those rules apply to this case, unless it were considered as a criminal prosecution?

The constitution of the United States will as little bear out the managers in their position, as the laws of England. That constitution gives the power of impeachment to the House of Representatives, and to the Senate the power of trying impeachments. Had the authors of that instruments, and those who adopted it, intended to leave this power at large, or to erect it into a general inquest, for enquiring into the qualifications of judges, and the expediency of removing them, nothing more would have been done than merely to give the power. But it will be found that various restrictions are imposed in the subsequent parts of the instrument, which prove that no person can be impeached except for an offence.

Thus, for instance, in speaking of the power of pardoning, the constitution provides (Art. 2. Sec. 2.) that "the President may grant reprieves and pardons for *offences* against the United States, except in cases of impeachment." Is not this the same thing as saying, that cases of impeachment are cases of offences? What, Mr. President, are offences, in the language of the constitution and the laws? For a definition of the term "offence," in a constitutional sense, we must consult our law books and not the caprice, or the varying opinions of popular leaders or popular assemblies. Those books tell us, that the word 'offence' means some violation of law. Whence it evidently follows, that no officer of government can be impeached, unless he have committed some violation of the law, either statute or common. It is not necessary for me to contend, that this offence must be an indictable offence. I might safely admit the contrary, tho' I do not admit it: and there are reasons which appear to me unanswerable in favor of the opinion, that no offence is impeachable, unless it be also the proper subject of an indictment. But it is

Digitized by Google

not necessary to go so far: and I can suppose cases where a judge ought to be impeached, for acts which I am not prepared to declare indictable. Suppose, for instance, that a judge should constantly omit to hold court; or should habitually attend so short a time each day as to render it impossible to dispatch the business. It might be doubted whether an indictment would lie for those acts of omission; although I am inclined to think that it would. But I have no hesitation in saying, that a judge in such a case ought to be impeached. And this comes within the principle for which I contend; for these acts of culpable omission, are a plain and direct violation of the law, which commands him to hold courts a reasonable time for the dispatch of business; and of his oath, which binds him to discharge faithfully and diligently the duties of his office.

The honorable gentleman, who opened the case on the part of the prosecution, cited the case of habitual drunkenness and profane swearing on the part of a judge, as an instance of an offence not indictable, and yet punishable by impeachment. But I deny his position. Habitual drunkenness in a judge, and profane swearing in any person, are indictable offences. And if they were not, still they are violations of the law. I do not mean to say that there is a statute against drunkenness and profane swearing. But they are offences against good morals, and as such are forbidden by the common law. They are offences in the sight of God and man, definite in their nature, capable of precise proof and of a clear defence.

The honorable managers have cited a case decided in this court, as an authority to prove that a man may be convicted on impeachment, without having committed an offence. I mean the case of judge Pickering. But that case does not support the position. The defendant there was charged with habitual drunkenness, and gross misbehavior in court, arising from this drunkenness. The defence set up was that the defendant was insane; and that the instances adduced of intoxication and improper behavior proceeded from his insanity. On this point there was a contrariety of evidence. It

Digitized by Google

is not for me to enquire on which side the truth lay. But the court, by finding the defendant guilty, gave their sanction to the charge, that his insanity proceeded from habitual drunkenness. This case therefore proves nothing further, than that habitual drunkenness is an impeachable offence.

As little aid can the honorable gentleman derive from the case of judge Addison, on which also they have relied. The articles of impeachment will shew, that judge Addison was not impeached, as the honorable gentlemen suppose, for rude and ungentleman like behavior in court to one of his colleagues; but for a supposed usurpation of power, in preventing his colleague by an exertion of authority, from exercising the right which he was supposed to possess, to charge a grand jury; and in exerting his official influence and power, to prevent the jury from paying attention to the legal opinions expressed by his colleague, in a civil case. The report of that trial, now in my hand, will attest the correctness of this statement; and will shew also that judge Addison was so far from being charged with rude and ungentleman like behavior to his colleague, that the honorable gentleman himself towards whom that behavior is supposed to have been used, and who gave evidence on the trial, bore testimony to the mildness and politeness of judge Addison's manner, on the occasions which furnished the grounds of impeachment. Whether the acts done by that learned and distinguished judge, did amount to an usurpation of unconstitutional power; or whether his colleague did possess those rights, in the exercise of which he was supposed to have been improperly restricted; are questions foreign from the present enquiry. But I am free to declare, that if judge Addison's colleague did possess those rights, and if he did arbitrarily prevent and impede the exercise of them, by an unconstitutional exertion of the powers of his office, he was guilty of an offence for which he might properly be impeached; because he must in that case, have acted in express violation of the constitution and laws.

Digitized by Google

The great principle for which we contend, and which is so strongly supported by the clause of the constitution already cited, that an impeachment is a criminal prosecution, and cannot be maintained without the proof of some offence against the laws, pervades all the other provisions of the constitution, on the subject of impeachment. The fourth section of the second article declares, "that the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and *conviction* of treason, bribery, or other high crimes and misdemeanors." This provision, I know, has been considered by some, as a mere direction of what shall be done, in those specified cases; and not as a prohibition, confining impeachments to those cases. But it must be recollected, Mr. President, that the constitution is a limited grant of power; and that it is of the essence of such a grant to be construed strictly, and to leave in the grantors all the powers, not expressly, or by necessary implication granted away. In this manner has the constitution always been construed and understood: and although an amendment was made, for the purpose of expressly declaring and asserting this principle, yet that amendment was always understood by those who adopted it, and was represented by the eminent character who brought it forward, as a mere declaration of a principle inherent in the constitution, which it was proper to make, for the purpose of removing doubts and quieting apprehensions. When, therefore, the constitution declares for what acts an officer shall be impeached, it gives power to impeach him for those acts, and all power to impeach him for any other cause is withheld. The enumeration in the affirmative grant implies clearly a negative restriction, as to all cases not enumerated. This provision of the constitution, therefore, must be considered, upon every sound principle of construction, as a declaration that no impeachment shall lie, except for a crime or misdemeanor; in other words, for a criminal violation of some law.

The same idea is found in the second section of the third article, third clause; where it is declared that

Digitized by Google

"the trial of all *crimes*, except in cases of impeachment, shall be by jury:" Plainly implying that cases of impeachment, are cases of "trials for crimes."

It is material also, Mr. President, to advert to the peculiar force of the term "conviction," which is employed in several parts of the constitution, in application to cases of impeachment. The third section of the first article, sixth clause, speaking of the trial of impeachments, says, "and no person shall be *convicted* without the concurrence of two thirds of the members present." The seventh clause of the same section, treating on the extent and operation of a judgment in impeachment, says, "but the party *convicted* shall nevertheless be liable and subject, &c." And the fourth section of the second article declares, that certain officers "shall be removed from office on impeachment for, and *conviction* of, treason, bribery, &c." This term "conviction" has in our law a fixed and appropriate meaning. There is indeed no word in our legal vocabulary, of more technical force. It always imports the decision of a competent tribunal, pronouncing a person guilty of some specific offence, for which he has been legally brought to trial. In an instrument so remarkable as the constitution of the United States, for technical accuracy in the use of terms, the frequent and indeed constant use of this word is decisive to prove, that in the intention of the framers of that instrument, no man could be impeached, except for some offence against law, of which he might in legal language be said to be "convicted."

In fixing the construction of this instrument no safer guide can be followed, than contemporaneous expositions, furnished by those who made or ratified it; and among those expositions, the most authoritative are to be found in the constitutions of the several states, formed about the same time, and drawn up in many instances by the same persons. Whenever it appears clearly from the context of these constitutions, that they affix a certain meaning to particular terms, we may safely infer that those or similar terms, in the constitution of the United States, were intended to have the same mean-

Digitized by Google

ing. And we shall find, by inspecting the constitutions of the several states, that impeachment has been considered by all of them as a criminal prosecution, for the punishment of defined offences against the laws.

Let us begin with that of Pennsylvania. In treating of impeachments, article the fourth, it speaks of *conviction* on impeachment; and declares that all civil officers shall be liable to impeachment for any *misdemeanor* in office. The term misdemeanor is of as accurate meaning, and of as much technical force, as any term in the law. It describes a class of offences against law, as well defined as any in the criminal code. A still stronger argument is furnished by the second section of the fifth article, which provides that for any reasonable cause, which shall not be sufficient grounds of impeachment, the governor may remove any of the judges, on the address of two thirds of each branch of the legislature. It is most manifest, that this provision would have been wholly unnecessary, had the people of Pennsylvania, in framing their constitution, considered impeachments, like the honorable managers, merely as inquests of office, by which a judge might be removed for any cause, which two thirds of each branch might think reasonable. And the arguments derived from the constitution of Pennsylvania, have more force, in as much as the terms "misdemeanor in office," used by it for describing impeachable acts, are much less strong, than "treason, bribery, and other high crimes and misdemeanors," employed by the constitution of the United States for the same purpose.

The constitution of Delaware, sec. 22, directs, that impeachments shall lie against all persons "*offending* against the state, either by mal-administration, corruption, or other means by which the safety of the state may be endangered." This is a very broad description of impeachable acts. And yet it is clear from the context, that those general words were intended to express specific offences against the laws, liable to punishment in the regular course of justice. It is declared that all impeachments shall be commenced "within eighteen months after the offence committed," and

Digitized by Google

shall be prosecuted by the attorney general, or such other persons as the house of assembly shall appoint, *according to the laws of the land.*" Persons found guilty on impeachment are to be disqualified, or removed, "or subjected to such pains and penalties as the laws shall direct." And the term "conviction," whose peculiar technical force has been already remarked, is applied by this constitution to cases of impeachment.

The people of Maryland did not think fit to invest their legislature with the power of impeachment; but have directed by their bill of rights, sec. 30, and by their constitution, sec. 40, that misbehavior in office shall be proceeded against by indictment, in a court of law only; and that removal, and in some cases disqualification, shall be the consequence of *conviction.* It will not be denied, that misdemeanor and misbehavior in office are convertible terms. If there be any difference, the latter is the less strong: and yet the people of Maryland have declared, that the term "misbehavior in office" means an indictable offence, of which a person may be *convicted* in a court of law.

The constitution of Virginia provides, that persons offending against the state by mal-administration, corruption, or other means by which the safety of the state may be endangered, "shall be impeachable by the house of delegates," in the general court, according to the laws of the land: "and that if all or any of the judges of the general court, should, on good grounds (to be judged of by the house of delegates) be accused of any of the *crimes* or *offences* above mentioned, such house of delegates may in like manner impeach the judge or judges so accused, to be tried in the court of appeals." Hence it appears most clearly, that these general words "offending against the state by mal administration, corruption, or other means by which the safety of the state may be endangered," words far more general and indefinite in themselves than those employed by the federal constitution, were considered by the people of Virginia as meaning specific crimes or offences, which might be proceeded against in a court of law, according

Digitized by Google

to the usual course of criminal justice. The words "any other means by which the safety of the state may be endangered," are certainly broad enough, to embrace those reasons of political expediency and state policy, for which the honorable managers contend, that a judge may be removed by impeachment; but we find that the people of Virginia had no idea of giving them a construction, so contrary to the notions entertained in this country, respecting legal rights, personal safety, and constitutional liberty.

The provisions made on this subject by the constitution of North Carolina, breathe the same spirit. That instrument declares section 23, "that the governor and other officers offending against the state, by violating any part of this constitution, mal-administration, or corruption may be prosecuted on the impeachment of the general assembly, or presentment of the grand jury, of any court of supreme jurisdiction in this state." This plainly implies that impeachable acts, though described in terms the most indefinite, were neither more nor less than offences, indictable in the ordinary course of law.

In the constitution of South-Carolina, article 5, we find the same idea necessarily implied. The words "misdemeanor in office" are used as the description of impeachable offences; the term conviction is applied to impeachments; and it is provided that persons so convicted, "shall nevertheless be liable to indictment, trial, judgment and punishment according to law." It is plain, therefore, that the words "misdemeanor in office," were understood and intended by the people of South-Carolina to mean offences against the laws, for which the offender might be indicted and "convicted."

The constitution of Georgia contains no words, which can operate in any manner to define or describe impeachable offences. It merely directs who shall have the power of impeaching, who shall try impeachments and what description of persons may be impeached. But in that of Vermont there is a provision on this subject, which, tho' very concise, is very strong to our

Digitized by Google

present purpose. Among the powers given by it, sect. 9, to the House of Representatives, is that to "impeach state criminals." This term "criminals," which in our laws is never applied except to persons charged with offences of the highest nature, sufficiently declares that the people of Vermont considered impeachments as applicable to cases of crimes only, and not to removals for reasons of state expediency: not even to cases of smaller offences, much less of indiscretion or impropriety of behaviour, such as is alledged against the respondent in this case. For surely it would be an abuse of language to apply the term "criminal" to improper interruptions of counsel; to rude, hasty or intemperate expressions; to ridicule employed by a judge against counsel, who in his opinion conducted themselves incorrectly; or to the precipitate and ill timed expression of a correct legal opinion. No, sir. This word imports the intentional violation of some known law; the perpetration of some specific defined crime, which may admit of precise proof, which every citizen may be able to avoid, and against which, when accused of it, he may know how to make his defence.

Such, Mr. President, is the solemn exposition of impeachable offences, given by the people of the United States, thro' the medium of their constitutions. Tho' not much accustomed to talk about the will of the people, there is no man that bows with more reverence to that will, when constitutionally declared. And shall we, Mr. President, let go this sheet anchor of personal rights and political privileges, to commit ourselves to the storms of party rage, personal animosity and popular caprice? Shall we throw down this great land mark, fixed by the wisdom and patriotism of our fellow-citizens and fathers? Instead of having our best and dearest rights secured, by fixed and known principles of law, shall we leave them to be governed and disposed of by the ever varying whims and passions of the moment? No, sir, I trust not. When I look at those benches and recollect how deep a stake the members of this honorable court have in those rights which form the palladium of our safety, and are

Digitized by Google

now entrusted to their care and keeping, I cannot but confidently expect that they will feel the whole importance of the great trust reposed in them by their country; that they will regard themselves as acting for future generations, as well as for the present age; and will elevate themselves above the sphere of little views and momentary feelings. They will recollect, sir, that unjust principles, adopted to answer particular purposes, are two edged swords, which often rebound on the head of him who strikes with them; and that justice, tho' it may be an inconvenient restraint on our power, while we are strong, is the only rampart behind which we can find protection when we become weak. They will remember that power which depends on popular favor, is of all sublunary things the most fleeting and transient; that it must from time to time change hands; and that when the change which sooner or later must arrive, shall have taken place; when those who now direct the thunder of impeachment, shall be placed, as ere long they must, in a situation to be smitten by its bolts, they will be glad to invoke, and unless they now set a great example of correct decision, will invoke in vain those constitutional privileges to which we now cry for safety.

Need I, Mr. President, urge the necessity of adhering to those principles, as it respects the independence of the judiciary department? Need I enlarge on the essential importance of that independence to the security of personal rights, and to the well being, nay, to the existence of a free government? These considerations of themselves strike the mind with a force not to be encreased by any efforts of mine. It is sufficient merely to bring them into the view of this honourable court.

But it is not to the party accused, to the nation, to posterity, and to the interests of free governments that the observance of settled constitutional principles, in cases of impeachment, is alone important. It is equally so to the character and feelings of those appointed to judge. Is there any member of this honorable court, who would wish, nay, who would consent, in decid-

Digitized by Google

ing this cause, to be set free from the restraints of the law, or more properly speaking to be deprived of its guidance, and left to the influence of his own passions, feelings or prepossessions? Were causes like this to be determined on views of expediency, and not on fixed principles of law, to what suspicions might not the judges be liable, of having sought the indulgence of some animosity, or the attainment of some selfish end, instead of consulting for the public good? But when they are known to be governed by the settled rules of law, and are considered as merely its organs, their motives will be more respected, and their conduct less liable to suspicion or reproach. Is any member of this honorable body prepared to relinquish the high and venerable station of the organ and expounder of the laws, in order to assume the doubtful and dangerous character of a judge subject to no rule but his own arbitrary will?

To a judge, too, it is the sweetest consolation in the discharge of his painful duties, that when he has doomed a fellow-citizen to dishonor and misery, he has merely pronounced the decision of the law, and not the dictates of his own will: that he is not the author of the sentence by which so much calamity is brought on others, but merely its official organ. This reflection soothes his mind under the anguish which it must feel from another's woe. And is there any member of this honorable court, who would consent to relinquish this consolation? I boldly say no. I feel that every heart will respond to the assertion. And if any who hear me be capable of entertaining a contrary opinion, or would wish in the same situation to hold a different conduct, I envy not their feelings, however highly I may estimate their intellectual powers.

In every light, therefore, in which this great principle can be viewed, whether as a well established doctrine of the constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those whose lot it may be to sit on the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow-citizen guilty; it

Digitized by Google

will equally claim, and I cannot doubt that it will receive, the sanction of this honorable court, by whose decision it will I trust be established so as never hereafter to be brought into question, that an impeachment is not a mere enquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal, but a criminal prosecution, for the support of which the proof of some wilful violation of a known law of the land is to be indispensibly required.

Before I proceed, Mr. President, to apply this principle to the case now under consideration, permit me to notice briefly another proposition advanced by the honorable managers, which I perfectly concur in, and shall take the liberty of using against them. They have laid it down, that the testimony of witnesses equally credible in themselves, is entitled to different degrees of credit, according to the means which they respectively enjoyed, of correctly discerning the truth, in the matter about which they testify. To this proposition I fully assent. Let the principle be applied to the case now under consideration. Look at the witnesses on each side. With some few exceptions perhaps, about which I do not feel it necessary to make any particular remarks, they are equally credible in themselves, equally disposed to state correctly the facts. But who are the witnesses on the part of the prosecution? It must be answered, that almost all of them are persons who have supposed themselves to be ill-treated by the respondent; whose resentment the lapse of four years has not been able to assuage; and who come here under the manifest influence of those angry feelings, to complain of their imaginary wrongs. It is plain that such persons, however correct in their intentions, however desirous of speaking the truth, are liable to be misled by the irritation which these events excited in their minds, and to state as facts the recollection of their erroneous impressions. It is perfectly manifest that those gentlemen were very much irritated by the transactions of which they com-

Digitized by Google

plain, and in which they were or supposed themselves to be parties. It is equally clear their anger has not yet cooled. And I will ask whether men in such circumstances, giving them the utmost credit for correct intentions, are equally entitled to belief with persons who like the witnesses on the part of the respondent, were calm, and disinterested spectators of the events which they relate? Equally respectable with the witnesses for the prosecution; much more cool; free from that irritation which the parties in contention can hardly ever avoid; and testifying their impartiality by expressing without reserve their disapprobation of some things in the respondent's conduct; it must be admitted that in every collision of testimony, they possess the highest title to belief.

Having taken this view of these preliminary points, I now proceed, Mr. President, to consider the various charges against our honorable client, in the order in which they have been stated by the prosecutors. It is not my design to go over the same ground, which has been so recently trodden by my able colleagues. The task assigned to me, is to range rapidly over the first six articles; to present some views of the subject, which the multiplicity of the matter induced my learned colleagues to omit; and then to discuss at large the law and the facts, under the seventh and eighth articles, which have not yet been touched.

On the case of John Fries, the subject of the first charge, permit me, Mr. President, to avail myself of a distinction, laid down by the honorable gentleman who opened the case on the part of the prosecution (Mr. Randolph). That honorable gentleman, in his opening address, made a distinction between a general maxim or principle of law, such as the definition of a crime, and a particular opinion on the law, as applicable to a particular case. The former he admits to be proper in a judge, at any stage of a trial. The latter he denies to be so. He has chosen the definition of one offence to illustrate his position; I will take that of another. Suppose a man to be indicted, and put on his trial, for burglary. The crime of burglary consists

Digitized by Google

in "breaking and entering a dwelling house, in the night time, with intent to commit felony." This is the established definition of this offence. According to the distinction of the honorable gentleman, the judge might at the commencement of the trial, or at any stage of it, declare this general principle respecting the nature of the offence, even before counsel were heard. Nay more, he would be justified in preventing counsel from attempting, before the jury, to controvert this principle. This latter point is not expressly admitted by the honorable gentleman; but it flows from his admission, as a necessary consequence. So far the judge might safely go. But should he advance a step further, and declare before counsel had been heard, that the acts done by the person on trial did amount to burglary, then he would be culpable, and even criminal: and this, the honorable gentleman contends, was done by the respondent in the case of Fries.

I consent to be judged by the rule which the honorable gentleman has himself established; and I undertake to shew, that nothing more was done by the respondent, in the case of Fries, than the honorable gentleman admits may be properly done by a judge: that he merely stated the general definition of the crime of treason, by levying war against the United States, but expressed no opinion whether the prisoner was guilty or innocent, whether the acts which he had done amounted to treason. For the correctness of this position I appeal to the opinion itself, as in evidence before the court. It is contained in exhibit No. 2, filed with the answer. In this paper the court after some preliminary observations, to shew that the questions relative to the constitutional definition of treason, were questions of law and not of fact, proceed to state as their opinion, "that any insurrection, or rising of any body of people, within the United States, to effect by force or "violence, any object of a great public nature, or of "public and general (or national) concern, is a levying of war against the United States, within the "contemplation and construction of the constitution of "the United States." "That on this general position, any such insurrection or rising, to resist or pre-

Digitized by Google

" vent by violence, the execution of any statute of the " United States, for levying or collecting taxes, du- " ties, imposts, or excises, or for calling forth the " militia to execute the laws of the union, or for any " other purpose; under any pretence, as that the sta- " tute was unequal, burdensome, oppressive, or un- " constitutional; is a levying war against the United " States, within the constitution." " That military " weapons, as guns and swords, mentioned in the in- " dictment, are not necessary to make such insurrec- " tion or rising amount to levying war; because num- " bers may supply the want of military weapons, or " military array." " That the assembling bodies of " men, armed and arrayed in a warlike manner, for " purposes only of a private nature, is not trsason; " although the judges and peace officers should be in- " sulted or resisted, or even great outrage committed " on the persons and property of our citizens." " That " the true criterion to determine whether *acts com-* " *mitted* are a treason, or a less offence (as a riot) is the " *quo animo* the people did assemble. That, if a " body of people conspire and meditate an insurrec- " tion to resist or oppose the execution of any statute " of the United States by force, they are only guilty " of a high misdemeanor; but if they proceed to car- " ry such intention into execution by force, they are " guilty of the treason of levying war; and the quan- " tum of the force employed, neither lessens nor in- " creases the crime." " That a combination or conspi- " racy to levy war against the United States, is not " treason; unless combined with an attempt to carry " such combination or conspiracy into execution," and that " some actual force or violence must be used, in " pursuance of such design to levy war; but it is per- " fectly immaterial, whether the force used is sufficient " to effectuate the object."

This no doubt is a long definition. Perhaps it might have been expressed in much fewer words. But still is a general definition of the crime of treason by levying war; without application or reference to any particular case, much less to the case of John Fries. It amounts nearly to this, " that for any number of people, howe- " ver small or inadequate, to rise, with intent to resist

Digitized by Google

" or prevent by force the execution of any general " law of the United States, and to employ actual force " for that purpose, amounts to levying war against the " United States, although neither military weapons or " military array be used." This is the substance of the opinion. All the rest is merely illustration, and in this shape it is as much a general definition, as that of burglary.

How wide a field of defence do these definitions leave open! In the case of an indictment for burglary, would any counsel peevishly or insolently retire from the prisoner's defence, because the court might, in the commencement of the trial, have stated this to be the legal definition of the crime. Would he insist on the absurd and mischievous privilege of controverting so plain and well settled a principle of law? No. Far different would be his conduct. He would enquire whether any acts had been done, amounting in law to the breaking open of a house? Whether the prisoner was the perpetrator of those acts, or a party in them? Whether the house was broken open in the night time? Whether it was entered by the prisoner as well as broken? Whether it was a dwelling house? And whether it was broken open and entered with intent to commit any crime, amounting to felony? All these questions would be perfectly open, under the general definition which has been stated; and on the result of these enquiries, would the guilt or innocence of the prisoner depend.

So in the case of Fries, it was perfectly competent to his learned counsel, under the general definition of treason given by the court, to contend that the acts proved did not amount to a rising of any number of people: that John Fries was not implicated in those acts; that they were not done with intent to resist or prevent, by force or violence, the execution of any general law of the United States; or that no force or violence was actually employed, in pursuance of such intention. All these questions were perfectly open to them, notwithstanding the general definition of treason given by the court. Not one of these questions did the court in any manner decide. These questions involved the application of the general definition, to the par-

Digitized by Google

ticular case; an application in which the true, proper and only defence of the prisoner consisted, and which the court neither made, nor intended to make.

Surely these questions offered full scope to the learned gentlemen, for the exertion of those argumentative powers, and the display of that legal learning, of which they have given in the shape of testimony, so handsome a specimen at this bar. Even that eager fondness for legal disputation, which has carried them on this occasion so far beyond the limits prescribed by the law of evidence, might have been gratified in this ample field. There was room enough for the learned and ingenious distinctions, which one of the gentlemen (Mr. Dallas) has told us that he intended to make, between the case of Fries and that of the western insurgents. It was his intention, he says, had he not been prevented by this unfortunate definition, to dwell on several circumstances, which, in his apprehension, distinguished the former of these cases from the latter. He tells us that his mind turned itself towards these distinctions, and was occupied upon them, from the moment when the court granted a new trial, after the first conviction of Fries. His mind was led into this course of reflection, by the stress which he had observed the court to lay, in the first trial of Fries, on the decisions in the cases of the western insurgents. It would surely have been very unkind in the respondent, to prevent the learned gentleman from exhibiting the results of these long and profound reflections. But happily the respondent did not prevent him. His disappointment must be attributed solely to himself. The circumstances on which he informs us that he intended to rely, for distinguishing the case of Fries from those of the western insurgents, were the martial array at Braddock's field; the march to Pittsburg, for the avowed purpose of attacking the garrison; and, I think, the attack on Nevil's house. The first of these circumstances applied to the nature of the assemblage, whether it amounted to a rising or insurrection; the second to the intent with which the rising was made; and the third to the degree and nature of the force or violence committed. They were all open to the learned

Digitized by Google

gentleman under the opinion: which did not declare what sort of an assemblage would constitute an insurrection or rising; what circumstances would be sufficient evidence of the improper intent; or what kind or degree of force or violence must be employed; but merely stated that a rising or insurrection, proceeding from such an intent, and accompanied by actual force or violence, would amount to levying war. Whether the assemblage in Bucks and Northampton, had the necessary ingredients to constitute a rising or insurrection; whether the acts done afforded sufficient evidence, of an intent to resist or prevent by violence or force, the execution of the act of Congress; whether the force or violence committed were sufficient, in nature or degree; and whether, in all or any of these points of view, the case of Fries in Bucks and Northampton, was weaker than that of the western insurgents, or materially different from it; were questions not at all affected by the opinion, but left entirely open to the learned gentleman: who, might notwithstanding this opinion, have discussed them before the court and jury, at all the length into which the exuberance of his genius so much delights to shoot.

These learned gentlemen possessed, therefore, under the opinion communicated to them by the respondent, even if it had not been withdrawn, all the latitude which moderate counsel could have desired. All the questions of fact; all the questions of intention, which are questions of fact; the whole business of deciding, whether the case proved came within the general principle of law; of applying the general rule to the particular case; remained within the province of the jury, and furnished the only proper means of defence. Even if the facts had been admitted, as the honorable managers contend, still the intent remained to be ascertained, and was a question of fact solely cognizable by the jury. But it is utterly incorrect to say that the facts were admitted. It was indeed admitted, or rather it was not doubted, that certain acts had been done by John Fries and others; but whether those acts were of such a nature, and proceeded from such an intention, as to bring the case within the ge-

Digitized by Google

neral rule of law laid down by the court, was a point unsettled, which formed the proper and sole ground of enquiry. And this point was not affected by the opinion communicated by the respondent to the prisoner's counsel.

And here, Mr. President, let me be permitted to notice what I deem a most dangerous error, respecting the constitutional power of juries in criminal cases. It is constantly asserted that the jury are to decide the law and the fact in criminal cases; and this is correct, when properly explained; but taken in its literal and unqualified sense, it is contrary to every principle of law, and every dictate of common sense. It is the province of the court to expound and declare the law generally, in all cases criminal as well as civil. To apply the law to each particular case; to decide whether the facts proved in any case bring it within the general rule of law, is the province of the jury, and their *only* province. They have no dispensing power over the laws of the land. Will any man in the least acquainted with our system of jurisprudence declare, that a jury has a right to decide, that breaking open a dwelling house in the night time with intent to steal, is not burglary, unless an actual theft be committed? I presume that no one will hazard such an opinion. The jury, in such a case, may decide that the house was not broken open, that is, was not a dwelling house, that the fact was not committed by the person accused, that it was not committed in the night time, or that it was not committed with an intent to commit a felony. But if they believe the affirmative on all these points, they must find the prisoner guilty, or commit a direct violation of their oaths. They are bound by the general principle of law, as declared by the court. Their duty, and their sole duty, consists in applying it to the particular case. In this sense, and in this alone, are they judges of the law as well as of the fact.

It is well known that a new trial may be granted in a criminal case, where the verdict is against the party accused, and is supposed by the court to be contrary to law. This proves that the jury are not the judges of the law, in the unqualified sense contended for

Digitized by Google

by some persons; for if they were the judges of the law in that sense, it would necessarily follow, that a new trial could no more be granted in favor of the prisoner in a criminal case, than against him. The rule that it cannot be granted against him has been established by the courts in favor of life, thro' a laudable motive of tenderness and humanity; and not because they had not power to grant new trials in this case, as well as in others, where the verdict is contrary to law.

So in case of an offence created by statute, a jury may declare that the case proved on an indictment, under the statute, does not come within it; for want of the improper intent, or some other necessary ingredient. But it has never entered into the head of any man to suppose, that the jury in such a case has a right to declare, that the statute itself is not a law of the land; has been repealed, has expired, or does not create any offence. All these are questions of law, which ce within the exclusive province of the court.

This consideration, by the way, furnishes the true answer to the famous Richmond syllogism, of which we have heard so much in this case; and proves the correctness of that decision, by which the counsel of Callender were prevented, most properly, from contesting before the jury the constitutionality of an act of Congress; a decision which the honorable managers have had the good sense not to call in question. This decision, undeniably correct as it is, and as strange as the absurdities are to which a contrary principle would lead, can be defended on no other ground than that for which I contend.

And I will ask how the case of treason can be distinguished, in this respect, from that of burglary? If a jury be bound by the general rule of law which defines the crime of burglary, and be confined solely to the enquiry, whether the case proved comes within that rule; upon what principle can it be contended that they are not equally bound by the general definition of treason?

Will it be contended that the latter definition is not as well settled as the former? This position I deny. How was the definition of burglary settled? It was

Digitized by Google

not by any legislative act remainining on record, or known by tradition; but by judicial determinations, declaratory of the law. In the same manner has the definition of treason by levying war been settled. Three solemn adjudications in the same court, and one of them in the same case, had declared it to be law; and it was the law of the land, as much as the law defining burglary, or any other offence. If gentlemen deny that three solemn decisions on the same point, by a court of the highest jurisdiction, are sufficient to settle the law; will they inform us how many decisions are necessary for that purpose? Or are we never to have fixed principles, or settled definitions of crimes? Is the law of treason never to be established on a certain basis? Are the nature and definition of this high offence to be left forever floating, on the uncertain and varying opinions of courts and juries? Is that which was not treason to-day, to be treason to-morrow, according to the caprice, the interests or the prejudices of those who may be appointed to determine, or to the power, influence or intrigues of the accuser or the accused? If succeeding courts and juries are not to be bound by precedents established by their predecessors, then will every thing be treason when a man is tried by his foes, and nothing when he is tried by his friends. There will no longer be any security, in times of party contention, for life, liberty, or property; and we are destined to see acted over in this land, vainly boasting of its freedom and happiness, the scenes of judicial murder and pillage, which disgraced our mother country, during the struggles between the houses of York and Lancaster. Sooner than live under such a system, I would take refuge in Turkey; where by bribing the Cadi, I might escape from judicial tyranny; and might be safe from the oppressions of the government, provided I avoided the offence of growing rich. Not for one moment would I live in a country, where I should be tantalized with the semblance of liberty, and in fact liable to the penalties of treason, whenever I might by any act of opposition, or any assertion of my rights or those of my fellow-citizens, become obnoxious to a

Digitized by Google

party in power. This must be the consequence should the principles contended for by the managers finally prevail. When the rules of law defining offences are fixed and certain, then is every man safe, because he may know the law, and may avoid offending against it. But if no respect is to be paid to former decisions; if counsel are to be allowed to controvert points, which have been solemnly and repeatedly adjudged; if our courts and juries, without regard to former decisions, are to declare that to be law in each particular case, which the passions, the prejudices, or the political views of the moment may dictate; then indeed have we grasped a shadow, while the substance has escaped from us; and the blood of our fathers has in vain bedewed their native soil. But no. So monstrous a principle cannot be endured, and will not receive the sanction of this honorable court. Rules of law, once established, must be adhered to. Courts must regard them as sacred, and must not allow them to be called in question. In this case the opinion communicated had been solemnly settled, and was a part and a most important part of the law of the land. There was no superior tribunal to review it; and if there be one, the argument is still stronger: for then the acquiescence of the parties, who took no measures to have these decisions reversed, is added to the authority of the court which made them. The court, therefore, where the respondent presided, was bound to consider these decisions as the law of the land; to declare them as such, and to prevent them from being called into question, for the purpose of misleading the jury.

Another charge urged against our honorable client, under the first article of impeachment, is, that he prevented the prisoner's counsel, in the case of Fries, from citing to the jury certain English adjudications on the law of treason, and some statutes of the United States. So far as this charge relates to the statutes, I shall leave it most cheerfully where it has been placed by my learned and ingenious colleague who commenced the defence. Nothing can be added to the striking and satisfactory view which he has given of

Digitized by Google

that point. As to the English authorities, I will make one observation, which did not fall within the scope of his argument.

The respondent did say that English adjudications, at common law, on the doctrine of treason, ought not to be read to the jury; that English decisions before the revolution of 1688, under the statute of treasons, were deserving of very little attention, and ought to be received with great caution; and that such decisions since that revolution, though proper to be cited, were not to be considered as absolute authorities, but merely as strong arguments. Into the legal correctness of this opinion, it is not now my purpose to enquire. That point has been sufficiently discussed. But I beg this honorable court to remark, that this opinion of which the learned counsel for Fries so loudly complain, was an opinion precisely in their favor, and gave them all the advantage on this subject, that they expected to derive from citing these English cases. It was, they tell us, to convince the jury of the very thing which the court thus declared to them; namely, that these English decisions before the revolution of 1688, were entitled to little or no attention; and that even those since the revolution, being in some degree founded on the former, ought to be received with caution, and not to be considered in the light of absolute and binding authorities. These were the points which they wished to establish, by citing the English adjudications; and these were precisely the points which the court established. The decision was completely in their favor, and yet they complain of it as a grievous injury. They complain of it, though in their favor, because it was made without giving them an opportunity of speaking. Whence this causeless discontent, this most unreasonable complaint? Did it proceed from the disappointment of a childish and little vanity, which made them wish to exhibit their talents before the public? Surely we cannot suspect those learned gentlemen of so contemptible a motive. Why then, I repeat, do they complain of a decision made in their favor? They have been compelled by the force of truth, to explain

Digitized by Google

the reason. The truth is, as it appears on their own testimony, that they complained, not because they thought themselves, or their client injured, by this decision; but because it suited their purpose to represent themselves as injured, their client as oppressed, the case as prejudged, and the conduct of the court as arbitrary and precipitate; in order to excite odium and resentment against the court, and commiseration towards their client, and to induce the President, by erroneous impressions thus made on his mind, to extend his mercy to a person, who could not have been thought a fit object for compassion, had the truth been known. The whole of this pretended displeasure; all this affected outcry about the privileges of counsel, the rights of jurors, and prejudged opinions; was a mere finesse, an artful contrivance, to procure the pardon of a criminal twice convicted of treason: and to procure it by holding up a falsehood to the view of the President, and of the public; by calumniating the court, deceiving the executive, weakening the confidence of the people in the administration of the laws, and sacrificing truth and justice to the attainment of a momentary purpose.

The learned gentlemen thought themselves justified in all this, by their duty to their client. It is not for me to condemn them. I am not here to enquire into the propriety of their conduct. But I may be permitted to ask, whether such a contrivance ought to receive the countenance of this high court? And whether gentlemen who have thought it right thus to act, ought not to be listened to with caution, when they come here, after their finesse has completely succeeded, to complain of injuries, which in the same breath they tell us are entirely fictitious? I will ask whether this honorable court ought not to discountenance such proceedings in future, by vindicating the conduct of the respondent in this particular? Counsel, Mr. President, have duties to themselves and to the public, as well as to their clients. They are at all times bound by the obligations of candor and of truth. They are at all times bound to respect the courts of justice and themselves. They owe to their clients every honorable ex-

Digitized by Google

ertion of their talents and industry, and the zealous use of every fair means of defence. In criminal cases, and especially when life is in jeopardy, we expect more zeal, and are willing to allow greater latitude. In favor of this zeal, we are disposed to excuse some departure from the strict line, which propriety would in other cases prescribe. But to be countenanced, upheld and commended, for attempting to excite odium unjustly against a court; and to induce the President to believe, that the prisoner was deprived by the court of a fair trial, when they knew the fact to be directly otherwise; is more than modest men would ask, or any man has a right to expect.

But let it be admitted for a moment, Mr. President, that on the first day of the trial of Fries, the respondent committed an error. I ask if it was not atoned for by his full and honorable retraction on the second? By the pains which he took to do away all the proceedings of the first day: to induce the prisoner's counsel to go on with the defence, and to secure to him, in the utmost latitude, every advantage for making that defence? One of the honorable managers has told us, that the respondent's conduct on the first day was an unpardonable sin; that repentance, if it came at all, came too late. But this, sir, is not the rule by which we hope one day to be judged. We live in the comforting hope, that repentance if sincere can never come too late. We hope that by a short or death-bed repentance, we may obtain pardon for a life of errors and sins. Our holy religion permits us to believe, that there is but one unpardonable sin, and that is hardness of heart, or refusal to repent. And shall we, frail and sinful mortals, mete to each other a measure, which an all just and all powerful God does not mete to us? Shall we refuse to each other the effects of that repentance, by which alone we can ourselves hope for happiness hereafter? If for one error thus atoned for the respondent must be punished, let the first stone be cast by him, who has always retracted and corrected his errors, as soon as he was made sensible that they had been committed.

Digitized by Google

I do not, Mr. President, with my learned colleague who commenced the defence, disclaim the term "repentance" for my honorable client. Repentance is a term that suits creatures so frail and liable to error as men, even the best of men. We all have need of it, and I trust that we shall be ashamed of our errors, but not of our repentance. I have often had occasion to repent myself. I fear that I have not done it often enough. And however slight the error which the respondent may have committed, I am willing, in his behalf, to rely on the plea of repentance and amendment.

But this amendment, we are told by the honorable managers, was a mere pretence, a cloak beneath which the respondent sought to hide the supposed deformity of his conduct, when he found that it began to attract attention. But I ask was it a pretence to entreat, to supplicate the prisoner's counsel to proceed with the defence, till the cup of humiliation was drained to the dregs? Was it a cloak to be anxiously solicitous, after the prisoner was abandoned by his counsel, to protect him from the dangers into which his ignorance of the law might betray him; to urge his acceptance of other counsel; to inform him carefully of his right of challenge; to assist him in cross examining the witnesses; suggesting such questions as might be to his advantage, and guarding him against such as might draw forth unfavorable answers; to prevent the witnesses in the submitted cases from being examined before his trial, least the jury might hear testimony unfavorable to him, which he could have no opportunity of cross examining? Was this the conduct of a designing hypocrite, seeking to gloss over his wicked purposes, by a fair outside of humanity and justice? Of an artful and ruthless oppressor, thirsting for the blood of an innocent victim? If this be oppression, God grant that I and mine may never be otherwise oppressed!

I come now, Mr. President, to the case of Callender. But before I enter into those views which remain to be taken of the charges arising out of that case, let me be indulged in some preliminary remarks, on that part of the evidence adduced in their support, which was sup-

Digitized by Google

posed by the honorable managers to furnish direct proof of corrupt intentions, on the part of the respondent.

This evidence was given by Mr. Mason, Mr. Triplet, and Mr. John Heath. As to the first gentleman, his testimony relates to a private and jocular conversation, no part of which he recollects perfectly, and the most material part of which, the part that furnishes the true explanation of the whole affair, he has entirely forgotten. It cannot be doubted that this honorable gentleman was dragged with extreme reluctance, to detail at the bar of a court of justice, a private and of course a confidential conversation, the most material parts of which a lapse of five years has effaced from his memory. It must have been to him a most painful necessity, a most cruel violence, which obliged him to do an act that, if done voluntarily, would have amounted to a violation of that confidence, which in the intercourse of society men of honor place in each other. Ought a species of examination to be countenanced, which must place honorable men in so painful a situation, and subject them to so cruel a necessity? Which must compel them, after having been considered as companions, and perhaps as friends, to assume the odious character of spies, and to fulfil the detestable functions of informers? Which must destroy all the confidence, and of course all the pleasure of social intercourse, that great sweetener of the ills of life; must spread the gloom of mistrust over all our moments of hilarity and relaxation; and must convert our parlors, our breakfast tables, and even our friendly suppers, where the bosom is wont to expand, and the heart is laid on the table, into scenes of watchful jealousy, of dark and cautious silence! Ought a practice to be tolerated, which thus strikes at the root of social harmony, private honor, and public morality?

How dangerous too is this species of testimony, to the interests of truth and the safety of innocence! In this very case, the honorable witness, with all his accuracy of recollection, and all his desire to represent the transaction in a light as favorable to the party accused as the truth would permit, has forgotten the most

Digitized by Google

material part of the conversation; that part in which he himself was immediately concerned, which drew forth the rest, and which furnishes the true explanation of the respondent's meaning. The part which he has thus forgotten, has been happily supplied by another witness, judge Winchester, who was also present at the conversation. But what might have been the situation of the respondent, had judge Winchester's memory been equally frail, or had he died before this trial? That most satisfactory explanation which he has given, and which has removed every shadow of doubt from this part of the case, would then have been wanting; and the respondent might have been convicted, on a recollection which would in that case have appeared complete, though we now know it to be utterly imperfect.

This explanation proves the whole conversation to have been a mere jest, and a jest provoked and drawn out by Mr. Mason himself. Without the explanation, it might have borne an improper, though not a criminal aspect. With the explanation, it amounts to nothing more than an expression of the respondent's intention, made in jest, by way of reply to a jest of Mr. Mason, to have the affair of "The Prospect Before Us" investigated, when he should arrive at Richmond, and to bring the author and publisher to punishment. Will it be said that in this there is any thing criminal, or even improper? Is it not the duty of a judge, presiding in a court of criminal jurisdiction, to cause enquiry to be made into offences which he knows to have been committed, and to take steps for bringing the offenders to justice? Suppose that instead of a libel, a piracy had been committed; and that the respondent, being informed that the parties were lurking in the district of Virginia, had declared that he would have them brought to trial, if they could be caught, and punished if guilty? Would this have been improper? And does the difference between offences make any difference in the duties of a judge? Is he not equally bound to execute all the laws? If gentlemen say no, will they be pleased to draw for us the proper line of discrimination, be-

Digitized by Google

tween those laws which a judge must execute, and those which he ought to neglect? Or is this line to be drawn by his own caprice? Was not the sedition act a law of the land, and was not "The Prospect Before Us" a violation of that law? If there were any circumstances which rendered it proper to dispense with the penalties of this law, or to pardon the offences committed against it, there was a power in the constitution to do so; but that power resided in the executive department, and not in the judicial; whose duty it was to execute all the laws, without respect to circumstances, persons, or cases.

As to the testimony of Mr. Triplett, I cannot conceive what proof it can furnish of criminal intentions. It amounts to this, and nothing more, that the respondent, in the course of some very loose and thoughtless conversations, from which it would have been much more prudent to abstain, applied some harsh epithets to "The Prospect Before Us," and its reputed author; and expressed an apprehension that he would escape punishment. But does it follow, that because a judge remarkable for hasty and strong expressions, has applied some harsh and angry epithets to a person believed to be an atrocious offender, he will not do him justice, when he comes on trial? It must also be remarked, that Mr. Triplett is manifestly in a mistake, respecting the last conversation which he has attempted to detail. He represents the respondent as saying, that the marshal had returned without Callender. But we know that the marshal did not return without Callender. This mistake on the part of Mr. Triplett, may induce us to doubt, whether with the most sincere desire to represent nothing but the truth, which I have no doubt that he felt, he may not have viewed the other circumstances also in too strong a light. We well know that facts of this nature derive their complexion, almost entirely, from small circumstances of time, manner and connection; and when we find so candid a witness, mistaken in so material a circumstance, we may fairly conclude that he has omitted on one hand, or too much heighten-

Digitized by Google

ed on the other, some of those finer shades, on which the character of the piece always depends.

With respect to the facts related by John Heath, I have no difficulty in admitting that, if true, it fixes the stain of corruption on the character and conduct of the respondent, and ought to produce his conviction. Juries in every case, and especially in criminal cases, ought to be selected without respect to any circumstance but their impartiality and legal qualifications. Of all circumstances, that of political opinion and party connexion is the most improper to govern, and ought the most carefully to be avoided. For a judge to interfere with the marshal, and direct him to strike off from a jury list, in a criminal case, all those persons who were supposed to agree in political opinion with the party accused; or in other words, to combine with the marshal in packing a jury, for the purpose of ensuring the conviction of the party accused, would be an offence for which he ought to be punished. But this testimony of John Heath is deeply shaken by one witness, and flatly contradicted by another. I will not enquire into the character of John Heath; which I have no means knowing or of making known; but I will say that it cannot stand on higher ground than that of David Mead Randolph, who has flatly contradicted Mr. Heath; or of William Marshall, who has gone as near to a positive contradiction, as it is possible to go without making one. There must be a mistake somewhere. But we cannot believe the fact stated by John Heath, without believing that David M. Randolph has been guilty of a flat and wilful perjury, and that William Marshall has gone as near it as possible. These gentlemen are known to all Virginia. The evidences of their character are to be found in the breast of every man in that state. But as to Mr. Randolph, there is direct evidence in this case to support his veracity. Mr. Hay has declared at this bar, that he did not recollect having used certain expressions which were attributed him, but had no doubt that he had used them, after Mr. Randolph said so. Such was his reliance on Mr. Randolph's veracity and recollection! It is not possible to have

Digitized by Google

stronger testimony in favor of a witness. If stronger could exist, it would be found in another circumstance which has appeared in evidence. When one juror whom he had summoned for the trial of Callender, told him that he had made up his mind to convict the traverser, and urged that circumstance as an excuse, the excuse was admitted by Mr. Randolph, and the juror was discharged. But when Col. Harvey applied thro' the chief justice, to be excused in a similar situation: and alledged as a reason that he was predetermined to acquit Callender, let the evidence against him be what it might, because he believed the sedition law under which he was indicted to be unconstitutional, Mr. Randolph would not excuse him. This fact appears by the testimony of the chief justice. Can it be for a moment believed, that a marshal acting in this manner would enter into a corrupt and profligate combination with a judge to pack a jury for the conviction of Callender; and would come to this bar and complete his turpitude by a flat and wilful perjury? His conduct in office; the universal respect which he enjoys in his country, among men of all parties and opinions; his manner of giving testimony at this bar; and the evidence which his political enemies have here borne in his favor, all preclude the idea.

This witness, so honorably supported by the principal witness on the part of the prosecution, so high in his character, so scrupulously delicate in his conduct, so ready to discharge a juror who had made up his mind to convict the traverser, while he refused to discharge one who was predetermined to acquit him, is said by John Heath to have presented the pannel of jurors to the respondent, who told him that if he had any "of those creatures called democrats on it," they must be immediately struck off. He positively declares that no such conversation as that stated by Heath ever took place; that the respondent never saw the pannel; and that it was not compleated till after the meeting of the court, when the respondent was on the bench, and therefore could not have been shewn to him.

Digitized by Google

In this positive contradiction of Heath, he is strongly supported by William Marshall; the irresistible effect of whose testimony, derived from the peculiar candour, solemnity and precision with which it was delivered, as well as from his high character, all who have heard him, have felt and acknowledged.

Heath has declared, that the incident which he relates took place at the lodgings of the judge; that he was there but once, which was in the morning, a little before the time when the court usually met; that he remained about half an hour; and that no person was present except the judge, the marshal and himself.

William Marshall declares, that in the morning he called on the judge, according to his custom, a little before the meeting of the court; that when he entered the room, Heath had left it, or was in the act of leaving it, and immediately went away; and that the judge did not say one word in his hearing, which it was possible for Heath to hear. Thus far he speaks positively. He adds that he firmly believes, but cannot positively assert, that the marshal, David M. Randolph, went with him to the judge's lodgings, and left them with him; and that they both together attended the judge to the court house. His reasons for this belief are, that he has a strong impression of the facts on his mind, tho' not a perfect recollection; that it was his daily custom to call on the judge in the morning, on his way to the court house; that in going from his own house to the lodgings of the judge, he passed by or near to the office of the marshal, who usually accompanied him, in order to attend the judge to court; and that he perfectly recollects a conversation between himself and the marshal, on the way from the judge's lodgings to the court house, in which he remarked to the marshal the circumstance of having seen Heath with the judge. This conversation with Mr. Randolph Mr. Marshall perfectly recollects, and that it took place on the way from the judge's lodgings to the court house; and he very naturally infers from it, that they left the judge's lodgings at the same time; as the circumstan-

Digitized by Google

ees which he has stated induced him to believe with equal probability, that they went there together.

If they went together, then is Mr. Marshall also in positive contradiction with Mr. Heath. The only way in which they can be reconciled, is to suppose that Mr. Randolph went there without Mr. Marshall, and had, before that gentleman's arrival, the conversation which is related by Mr. Heath. It could not have been afterwards; for Heath went away as Marshall entered, and did not return. He has said that he was there but once; and that when he left the judge he went immediately on the hill, and related the conversation. That Marshall and Randolph went together, is in the highest degree probable; not only from Marshall's belief of the fact, and the strong impression of it remaining on his mind; but also from the circumstances which he has stated. If they went together, then it is clear, *if* Marshall tells the truth, that Heath left the room as they entered it; that no conversation could have taken place between Randolph and the judge, in the hearing of Heath, without being heard by Marshall also; and that none in fact did take place. Consequently it is manifest, that unless we believe, contrary to all probability, and to the belief and strong impressions of Marshall himself, that Randolph went to the judge's lodgings before him, we must admit that his testimony, as well as that of Randolph, is in flat contradiction to the testimony of Heath.

To this double contradiction we must add, the extreme improbability of the fact itself. A judge having a design to pack a jury, for the purpose of procuring the conviction of a person, whose supposed offence was intimately connected with the political struggle, in which the country was then so warmly engaged; about to execute this design, at the place where the prosecution had excited the greatest irritation; surrounded on all sides, and watched at every moment, by those whom he knew to have most zealously espoused the cause of the supposed offender; and entering into a corrupt combination with the marshal, for the purpose of carrying this criminal design into effect; a judge in these

Digitized by Google

circumstances and with these views, developes his plan to a perfect stranger; whom, if he had known any thing of him, he must have known to be perfectly devoted to the political friends and supporters of the party accused! Sir, the thing is incredible. The judge must have been a fool, as well as a knave, to act in this manner. Conspiracy, sir, seeks darkness and not light. Its plots are formed in secret corners. Its communications are wrapt up in cyphers, or conveyed in cautious whispers. Had the respondent intended to hold such a conversation with the marshal, he would have waited till Heath was gone, would then have drawn his accomplice into one of those dark hiding places which conspirators love, and there would have muttered his corrupt orders. If the words which Heath relates had been spoken, the single circumstance, that they were spoken openly in his presence, would be sufficient to prove, that they were nothing more than a foolish jest, devoid alike of criminal intent and serious meaning. It is indeed possible that Heath may have heard the respondent utter some inconsiderate jest, about democrats on the jury, which his zeal led him to mistake, for a direction to the marshal to strike them off. I am desirous of supposing, that something of this sort may have happened: for I can see no other way of rescuing this man from the imputation of wilful false swearing; which it would be most painful to see fixed on any person, and especially on one who has filled an honorable station under the government of his country.

Before I quit the subject of Heath's testimony, let me be permitted, Mr. President, to ask why, if it was believed, it was not taken a year ago, when witnesses were convened from all parts of the continent, and the testimony was collected on which these articles of impeachment were founded? It must have been well known at that time; for he has declared that he mentioned the fact to Hugh Holmes, Merriwether Jones, and some others, as soon as it happened; and to a great many persons afterwards. Had this testimony then been taken, and presented to the public, with the

Digitized by Google

rest of the evidence, we might have been prepared to contradict or explain it. I will ask why the honorable managers have not summoned some of those persons, to whom this story was related by Heath, and who might have corroborated or refuted his testimony? Those persons were fully within their reach. Nay! the minutes of this court shew, that Mr. Hugh Holmes has actually been summoned; and, if I am rightly informed, he has attended for three days past. Why is he not produced? I will not undertake to account for this omission; but I will say, that if Heath's testimony was believed, it ought to have been taken at first, so as to give us an opportunity of investigating it fully; and that it appears probable, that the managers would have adduced the witnesses who were certainly in their reach, to corroborate Heath, did they not apprehend a contradiction instead of a corroboration.

So much for the proofs adduced, of a previous corrupt intention in the respondent, to procure the conviction of Callender. Weak as they are in themselves, and broken by the opposing testimony, let us complete their overthrow, by bringing against them the proofs which the evidence exhibits, of a disposition full of justice and humanity. It is written that "by their fruits ye shall know them." Let us then look to the fruits. Let us examine the conduct of the respondent towards Callender, throughout the trial; and enquire whether it bears the marks of a disposition to oppress.

And first, let us oppose conversation to conversation; the conversation with William Marshall about the jury to those with Mr. Mason and Mr. Triplett. William Marshall has informed us that the judge, having heard the name of Mr. Giles mentioned in court, enquired if that was the celebrated Mr. Giles, member of Congres; that he afterwards asked the witness whether it was probable that Mr. Giles would remain in Richmond, till the trial of Callender; and afterwards added that he should wish Mr. Giles to be on that jury; and indeed, if it were proper for him to give any intimation to the marshal respecting the jury, would request him

Digitized by Google

to compose it entirely of persons, who agreed with Callender in political opinions. What is to be inferred from this conversation? That he wished to convict Callender? No. But that as he knew the case to have excited strong party feelings, he wished the person accused to have a trial which would silence clamor, and preclude all suspicion of improper bias; so that a conviction, should one take place, being free from the imputation of party vengeance, might operate more strongly as an example, to check the licentiousness of the press. Surely this motive was humane towards the party accused, and highly patriotic as it respected the public.

When Callender was taken, the respondent, instead of committing him to prison, as he might have done, there to wait till bail should be offered, manifested the utmost readiness to let him go out and seek for bail, and an anxious solicitude that he should find it. Instead of demanding bail in a large sum, one, two or three thousand dollars for instance, which it was in his power to do, he demanded only what Callender himself declared that he could give; and bail was actually taken, in the very moderate sum of two hundred dollars.

After the counsel of Callender had been most properly over-ruled, on legal grounds, in their attempts to obtain a continuance; the respondent, being obliged to refuse the continuance, for which no sufficient ground was laid, humanely offered to postpone the trial, for weeks and months, for the accommodation of the traverser and his counsel. When this was refused, he postponed it from day to day, as long as they desired, to give the witnesses who were within reach an opportunity of coming in; and offered to issue attachments for those who did not appear, which would have induced necessarily a further delay.

And, lastly, when Callender was convicted, and thus placed completely within the power of the court, the respondent, instead of going to the utmost verge of the law, in the severity of punishment, fined him only one tenth of the sum, and imprisoned him only for but

Digitized by Google

little more than a third of the time which the law allowed. The sum limited by law was two thousand dollars; and the fine imposed was two hundred. The term of imprisonment which the law allowed, was two years, and the time fixed by the court was nine months.

Are these, Mr. President, the fruits of a disposition, oppressive and corrupt? Again I say, if this be oppression, God grant that I and mine may never be otherwise oppressed.

It is urged against the respondent, under the second charge, that he refused to let the indictment be read to the jury, when it was requested by Callender's counsel. Why did they wish the indictment to be read? It was, they tell us, for the purpose of making known to John Bassett and the other jurors before they were sworn, the nature of the charges; and thereby enabling them to declare whether they stood indifferent, or had made up and expressed an opinion as to the matter in issue. But John Basset has informed us, that when the question whether he had formed and expressed an opinion was put to him, he was perfectly apprized of the nature of the charges, and knew that Callender was indicted under the sedition law, for printing and publishing "The Prospect Before Us." As to the other jurors, it is in evidence that before the question was propounded to them, the respondent explained to them fully the subject and object of the prosecution, and the nature of the issues which they were called upon to try. Where then was the necessity, where would have been the use of reading the indictment? It could have informed John Basset of that only which he knew before; and the other jurors of that which the respondent explained to them, much better than they could have understood it, by merely hearing a long indictment read in court. The object of the counsel, they say, and certainly the only proper object, was to inform the jury. The judge took a shorter and much more effectual method of attaining the object. He clearly and fully stated to the jury the matter in issue, the points in dispute, and the legal principles which ought to govern their determination. He told

Digitized by Google

them that Callender was indicted for printing or publishing certain libellous matter, extracted from "The Prospect Before Us;" that he must be proved to be the author or publisher of that book; that the passages stated in the indictment must appear to be contained *verbatim* in the book, and to be false, scandalous and malicious; and that the book must appear to have been published with intent to defame the President of the United States, and to bring him into disrepute and contempt. All this he fully explained to the jurors, before the question was propounded to them. Will any one say that all this could have been as clearly understood by the jury, from simply hearing the indictment read? And is a judge to be censured, because, instead of consuming the time of the court in reading a long indictment, he took a shorter and more effectual method of attaining the only proper object that could be attained by the reading?

As to the main point of the second charge, the overruling of Mr. Basset's supposed objection to serving on the jury, I leave the legal correctness of that decision where it has been placed by the testimony of Mr. Basset himself, and by the very learned arguments of my two colleagues, who took up this part of the case. But admitting it for a moment to be incorrect, it is not impeachable, unless it proceeded from an improper motive. And what evidence of an intention to oppress, or other improper motive does it furnish? The respondent did not know, and had no means of knowing the political opinions of Basset. And if he had known them, they could have furnished no reason for a particular wish to retain that gentleman on the jury. It would have been very easy to find another juror of the same opinions, who would have answered the purpose equally well. It is in evidence that the city of Richmond, where the court sat, and from whence a new juror must have been summoned had Basset been excused, abounded with persons of the same politics. Why then commit a crime, from which it was manifest that no advantage could have been derived?

Digitized by Google

Stress has also been laid on the question propounded to the jurors in this case; "whether they had formed *and delivered* an opinion on the charges in the indictment?" But this question, it will be recollected, was the same which had been settled in the case of Fries, after much deliberation. This appears by the testimony of Mr. Rawle. If, therefore, it were an improper question, it would furnish no proof of improper intentions against Callender; since it merely followed a precedent, which was established without the least reference to his case: a precedent too, in which judge Peters concurred; and altho' judge Peters was, I presume, included in the general charge of imbecility of character, advanced against the district judges by the honorable manager who opened the prosecution, he has never been charged with a deficiency in legal knowledge.

It has moreover been proved undeniably, by my two learned colleagues who discussed this charge, that this question, as propounded to the jurors in the case of Callender, was a great relaxation of the law, in favor of the traverser. It was therefore an indulgence instead of an act of oppression; and adds one more to the numerous proofs displayed by the respondent in this case, of a disposition full of humanity and kindness towards the party accused.

Under the third charge, which is founded on the rejection of Col. Taylor's testimony, it has been contended by the honorable managers, that the respondent rejected this testimony without knowing what it was. But this, sir, is an utter mistake. No part of Col. Taylor's testimony was rejected except what related to the three questions stated by the counsel for Callender. From any thing that appears we cannot conclude, that any other testimony which Col. Taylor might have been able to give, would have been rejected. It was not suggested that he could give any other, and there was no question about any other. Into the legal correctness of rejecting those questions, it is not necessary for me to enquire. That point I most cheerfully leave to be decided on the very learned and conclusive argu-

Digitized by Google

ments of my two colleagues. But I will request th indulgence of this honorable court, while I advert, a briefly as possible, to some of those consideration which shew conclusively to my mind, that admittin the decision on this doubtful and difficult point of law t have been incorrect, it could not have proceeded fron improper intention.

And here let me remark, that the respondent coul not have been ignorant of Col. Taylor's high standin and character in the state of Virginia, of the influenc attached to his name and his opinions, or the resent ment which must in all probability be excited, by an act of oppression or impropriety, whereof he might i any degree be considered as the object. The respon dent could not be ignorant of the state of irritatio which then existed, in that part of the nation, on th subject of the sedition law; nor of the extreme offenc which must be given by any conduct of the court, hav ing or capable of receiving the appearance of oppres sion, under that law. He could not be ignorant that t reject Col. Taylor's testimony was extremely capabl of receiving that appearance, and could hardly fail t assume it in the state of personal and political feelin which then existed. He is admitted on all hands to b a man of sense: and would a man of sense, withou some strong motive, commit deliberately a crime, s likely to blow up a flame of resentment against himsel and those with whom he was connected?

What motive could the respondent have for rejectin improperly this testimony? To secure the convictio of Callender? No: for he was equally sure of tha without the rejection—Col. Taylor's testimony applie to but one charge, and there were nineteen others un defended. If then he rejected this testimony, know ing it to be proper, he committed without motive or ob ject, the crime the most likely to heap odium on him self, and to bring disgrace and ruin on the party wit which he was connected.

Had he been actuated by a criminal intention to op press Callender, it is far more probable that he woul have received this testimony, believing it to be impr

Digitized by Google

per, than that he would have rejected it, believing it to be proper. A judge capable of acting deliberately under the influence of such a design, must be as regardless of the law as of his oath. His considering the testimony as illegal would not prevent him from receiving it, if receiving it could serve his purpose better than its rejection. In this case it would have served his purpose better. To reject it gave him no additional hold on Callender, who was placed completely in his power by the nineteen undefended charges; but to receive it would throw a cloak of fairness and humanity over his conduct, under cover of which he might more safely and more fully glut his vengeance. The more he had saved appearances in this respect, the more safely might he have indulged his vindictive temper afterwards.

But it is clearly proved, by his requesting the district attorney to consent to this evidence, that he was actuated not by a wish to exclude it, but by a conscientious belief that it was illegal and inadmissible. This request may perhaps be represented, and I think already has been, as a mere cloak; as an artful subterfuge, to escape from the indignation which he saw rising. But how does this agree with the character of open and high-handed violence, which the honorable gentlemen attribute to the respondent? How does it agree with that incautious openness in his conversation, that indiscreet promptness in his conduct, almost amounting to precipitation, which appear throughout to enter essentially into his character? And had he been thus artificial, thus capable of throwing an hypocritical cloak of candor over his wickedness, must he not have perceived that his true policy consisted in receiving the testimony without regard to its illegality.

If there could remain any doubt as to the correctness of his motives in rejecting this testimony, it would be removed by his offer to submit the question to the judges of the Supreme Court, and to respite the sentence until their opinion could be known: the traverser, in the mean time, remaining at large on bail. It is distinctly stated by Mr. Robertson and Mr. William

Digitized by Google

Marshall, that this offer was made in reference to the decision of this point. We have had indeed some cavilling about bills of exceptions in criminal cases. Perhaps the judge may have expressed himself inaccurately. He may have spoken of a bill of exceptions instead of a case stated; or he may have been misunderstood by the witnesses in this particular. But it is unquestionably proved, that in substance he offered to submit the question, whether this testimony was properly rejected or not, to the revision of all the judges of the Supreme Court; to let the sentence await the result of their deliberations; and to grant a new trial, if they should think the decision erroneous. It is well known to every lawyer, that altho' no writ of error or bill of exceptions lies in criminal cases, yet it is the usual practice in England as well as in America, when any new and difficult point arises in a criminal trial, to state it for the consideration of a superior court, and to respite the judgment till the decision of that court can be had. The point in such cases is regularly argued by counsel, before the superior court; to whose decision the judgment of the inferior court is made to conform. It is also known that a new trial may be granted in a criminal case, where there is a conviction, tho' not where there is an acquittal. What the respondent offered in this case, might therefore have been done: and he went further. He offered to assist Callender's counsel in doing it. He offered them the assistance of his legal knowledge and experience, in framing the case to be stated on the record, for the consideration of the Supreme court. This appears from the testimony of Mr. William Marshall. It is not for me to decide or enquire why these offers, and all the others made by the respondent in this trial of Callender, were contemptuously rejected by his counsel. It is enough for me that the offers were made; and that the conduct of my honorable client in making them, taken in connexion with the other circumstances which have been noted, proves beyond all possibility of doubt, that however erroneous in point of law his rejection of Col. Taylor's testimony may have been, it proceeded from his ho-

Digitized by Google

t judgment, and not from a corrupt intention to op-
ss.

. come now, Mr. President, to notice some of the
ırges embraced by the fourth article: and first the
ısal to continue the case of Callender till the next
m. To prove the correctness of this refusal, in
nt of law, I desire no better authority than that pro-
ɔed by the honorable managers themselves, from 6,
ɔon's Abridgement, new edition, page 652 It is
re laid down, on the authority of Tidd's practice,
), 3 Burrows, 1514, and 1 Black. Rep. 436, that
where there is no cause of suspicion, the affidavit to
: off the trial, on account of the absence of a mate-
l witness, is sufficient in the common form: namely,
t the person absent is a material witness, without
ose testimony the defendant cannot safely proceed to
l; that he has endeavored without effect to get him
ɔpœna'd, but that he is in hopes of procuring his
ıre attendance. But if there be any cause of suspi-
n, the court should be satisfied from circumstances,
t, that the person absent is a material witness; se-
ıdly, that the party applying has not been guilty of
laches; and thirdly, that he is in reasonable ex-
tation of being able to procure his attendance at some
ıre time." Here it appears that even where there
o cause of suspicion, that is, no cause for suspecting
t the application for a continuance is made merely
the purpose of delay, still the affidavit must state,
t the party applying for the continuance, "is in hopes
procuring the future attendance of the witness."
ɛ affidavit in Callender's case is contained in the ex-
it, No. 5, filed with the answer. Let it be examin-
and contrasted with this authority. It will be
ıd to contain no such statement; and is, therefore,
rly insufficient, even had the case been free from
ıicion of affected delay. But is it possible for any
to say, that it was free from such suspicion, after
ng heard the testimony delivered at this bar? Has
he leading counsel for Callender, who filed the af-
it, and made the motion for a continuance, impli-
acknowledged that his sole object was delay? Has

Digitized by Google

he not acknowledged that he knew Callender to be incapable of defence, on any other ground than the unconstitutionality of the sedition law; and consequently that he knew the absent witnesses to be unnecessary, and was as well prepared for trial without them, as he could be with them; since nothing that they could prove, could have any effect on that question? Has he not expressly declared, that one great object which he had in wishing for the continuance, was to get the trial before a different judge? And when this is admitted by the learned gentleman himself to have been the truth, was it very unnatural that the respondent should suspect it? If he had grounds for suspecting it, of which he was to judge, the authority informs us that there ought to have been circumstances stated by the affidavit, sufficient to satisfy him that the absent witnesses were material, and that the party applying was in reasonable expectation of being able to procure their attendance at some other time. No such expectation is stated in the affidavit, which was clearly insufficient on that ground: and a comparison of it with the indictment plainly shews, that the absent witnesses were not material.

The learned managers are therefore entitled to our thanks, for furnishing us with an authority which conclusively establishes our case.

But admitting the respondent to have decided incorrectly, in refusing this continuance, where is the evidence of improper intention? If it were an honest error in judgment, he is free from blame. And how can we doubt the uprightness of his intentions, when we recollect that although he considered himself unauthorised to grant a continuance till the next term, because it was not a matter of mere discretion, and no legal ground for it was in his opinion shewn, he yet offered a postponement for six weeks, which it was in his power to grant without legal cause? This offer to postpone for six weeks, which throws so strong a light of upright intention and humane indulgence, on the whole conduct of the respondent, has been forgotten by Mr. Hay; but fortunately for us it is remembered

Digitized by Google

distinctly by three or four most respectable witnesses, and especially by Mr. Edmond Lee and Mr. William Marshall. There can be no doubt of the fact. It is even manifest that three or four months would have been allowed, had they been asked for. To give six weeks would have made it necessary for the judge to return home, in order to hold the court in Delaware; and when he had returned, it would have been more agreeable and convenient to remain some time at home, than to hurry immediately back to Richmond, in order to hold the court at the end of six weeks. How is this humane and accommodating offer to postpone, at a great inconvenience to himself, to be reconciled with a corrupt disposition to oppress Callender? And why should the respondent refuse to continue the case till the next term, which would have exposed him to no inconvenience or trouble, and yet offer to postpone it for six weeks, at the expence of a new journey to Richmond? It could have been for no other reason, than a belief that he was obliged by the law to refuse the continuance, and a desire to indulge the traverser and his counsel, as far as the rules of law would permit.

Here again I forbear to enquire into the motives of Callender's counsel, for refusing this indulgence, by which they would have completely obtained all the legal and proper objects of a continuance. With their motives we have nothing to do. It is into the motives of the judge alone that we are bound to enquire; and of the purity of them, this offer so indulgent and humane, and so unaccountably rejected, leaves no doubt.

As to the rude, unusual, and contemptuous expressions, which are charged under the fourth article, and have been detailed by one of the witnesses for the prosecution, it is material to remark, how different an impression these expressions made on different persons, according to the various states of mind in which they were heard. Mr. Hay was so highly irritated, as to construe a bow into an affront. There had been much mirth at his expence, in which Col. Taylor tells us that he did not at all partake; and he thought these expressions rude and contemptuous. To Col. Taylor, who,

Digitized by Google

though perhaps not inclined to view the respondent's conduct with very favorable eyes, had not the same causes of irritation with Mr. Hay, and was far more cool, they appeared in the less exceptionable light of "imperative, sarcastic and witty." Mr. Gooch may be considered perhaps as favorably inclined towards the respondent, but has shewn no disposition to extenuate his conduct; and, he regarded these expressions, as mere efforts on the part of the respondent to shew his wit. Wit, I allow, has nothing to do on the bench. If a judge should happen to possess it, attempts to display it in the discharge of his official functions, would perhaps be unbecoming, or even improper; but certainly not criminal. To Mr. Basset, who appears to be of a warmer temperament, and whose feelings seem to lean towards the respondent, those expressions appeared to be firm without being imperative, and facetious but not sarcastic. And is criminality to be inferred from acts which thus receive their hue, not from any thing in themselves perceptible to this honorable court, but from the characters, the feelings, and the modes of thinking of those who relate them? If so, then innocence and guilt must depend not on the conduct of the accused, but on the temper and discernment of the witnesses. The chief justice of the United States, who was present during all these transactions, saw nothing improper or unusual in the conduct of judge Chase. These expressions, which so forcibly struck the heated and angry mind of Mr. Hay, conveyed no idea of impropriety to the mind of the chief justice; a gentleman as remarkable for the delicacy of his manners, as for quick discernment and sound understanding. Mr. Edmund Randolph was in court during a great part of Callender's trial, and he perceived in the conduct of the court, nothing rude, unusual, or indicative of a disposition to oppress. I appeal to all who have the pleasure of knowing that gentleman, whether such conduct could have taken place without arresting his attention. So remarkable himself for urbanity of manners, and correctness of personal deportment, he must have been shocked by so glaring a departure from

Digitized by Google

them, in a judge, seated on the bench. That lively and instinctive sense of propriety, which forms the basis of refined good breeding, would have made him feelingly alive to such a departure, in such a place, from that line of conduct which decorum no less than duty prescribes to a judge. On those finely attuned nerves, which render him the delight of every social circle where he appears, expressions rude and contemptuous, would have grated most harshly, and would have made an impression not to be forgotten. Yet Mr. Randolph remembers no such expressions.

And we find no less difference between the different witnesses, respecting the specific terms of those expressions, than respecting their general character. Of this one instance may suffice. Mr. Hay has stated that the respondent interrupted Mr. Wirt, and rudely and peremptorily ordered him to sit down. The expressions which this witness attributes to the respondent, on this occasion, are, "sit down, sir;" than which the language furnishes none more harsh or indecorous. But from the testimony of Mr. Robertson, a disinterested spectator, who took down in short hand all that passed at the trial, it appears that the expressions addressed to Mr. Wirt, were, "please, sir, to be seated." And Mr. Gooch, who attended the trial for the express purpose of observing all that passed, states that the respondent, being about to deliver an opinion while Mr. Wirt was up, said to that gentleman, "please, sir, to take your seat." Thus it is that passion distorts every object to the view, magnifies mole hills into mountains, and converts the most complaisant phrases into "rude, unusual, and contemptuous expressions." To the heated imagination of Mr. Hay, the expressions which he has detailed no doubt appeared in that light; but this honorable court will be guided, not by the exaggerated and distorted views presented to his irritated mind, but by the testimony of those calm and dispassionate witnesses, who were able to view the subject through an unclouded medium.

Let me now, Mr. President, be indulged in one or two remarks respecting the interruptions of counsel,

Digitized by Google

which form one of the charges under this article. Mr. William Marshall has told us that he remembers a case, in which counsel were more frequently interrupted by judge Iredell, than they were, on this occasion, by the respondent. We all know the character of that eminent and excellent judge, whose just eulogium the honorable managers have pronounced at this bar, and whose example they have set up as a standard, whereby to measure the conduct of the respondent. Will they not in this instance consent to be judged by their own rule? Will they still insist on condemning in the respondent, that which has been practised to a greater extent by judge Iredell?

But we know the cause which produced the greater part of these interruptions, and which rendered them proper and necessary. Mr. Basset has informed us, that Callender's counsel appeared to rest their case wholly on the unconstitutionality of the sedition law; that they wished to argue this point before the jury, and had flattered themselves with the hope of success; that after the court had formally declared this attempt to be improper, and that the jury could not take cognizance of the question, they continually renewed the attempt, and as often as they did so were stopped by the court. This statement is supported by Mr. Gooch and Col. Gamble. And will any man say that under such circumstances, it was not proper to interrupt the counsel? Will any man say, that counsel ought to be suffered to fly in the face of the court's authority, and to set at nought its orders and decisions?

These interruptions, moreover, as the chief justice has informed us, were made in the ordinary manner of the judge, and were not more frequent, than was usual with him in civil cases. Therefore they afford no proof of an oppressive disposition towards Callender; or of an improper disposition towards any person. They afford proofs of that promptness, sometimes bordering on precipitation, which is well known to make part of his character. It is in proof by the testimony of Mr. Purviance, who has long practised in courts where the respondent presided, that he is much in the habit of

Digitized by Google

interrupting counsel, even those to whom he is known to be most strongly attached; that in his interruptions there is no discrimination between his friends and those who are not so; and that if counsel when thus interrupted keep their temper, and coolly and respectfully insist on their right to be heard, they never fail to obtain a hearing, and frequently succeed in removing impressions, which the judge had too hastily taken up against their cause. If here be weakness, there is magnanimity which atones for it; and if in this case Mr. Hay, instead of contemptuously leaving the court, when he thought himself improperly interrupted, had maintained his ground with firmness, but with that respectful manner also which was due to the age and station of the judge, and which would have been highly becoming in himself, there is no doubt that he would have obtained as full a hearing as he could have desired.

On the "indecent solicitude" charged by this article to have been manifested by the respondent, for the conviction of Callender, I will remark, that if its existence had been proved, still it broke out into no overt act of oppression or injustice, and therefore is not the object of punishment, or of judicial cognizance. Intentions, unless accompanied by acts, solicitude and wishes, unless carried into effect, are offences unknown to our criminal code, and inconsistent with the principles of our constitution.

The fifth and sixth charges, relative to the operation of the Virginia laws on the case of Callender, and their supposed violation by the respondent, have been so ably and clearly refuted by my two learned colleagues, who immediately preceded me, that nothing remains to be said on those points. I will merely remark, that had an error been committed, in awarding a capias against Callender on the presentment, and making it returnable to the court then sitting, it would have been the error of the district attorney and the clerk, for which the respondent could have been in no manner answerable. It is in evidence by the testimony of the clerk himself, Mr. William Marshall, that when

Digitized by Google

the presentment against Callender was returned into court, the respondent, then sitting alone, asked Mr. Nelson, the district attorney, what was the proper process in such a case? who answered, a capias; and that the capias actually issued, was immediately drawn up at the bar by the clerk, was inspected and approved by Mr. Nelson, and was then ordered by the judge. In a case of this nature, relating to the local laws and practice of the state, the respondent being then unassisted by the district judge, could apply to no better guides than the clerk and the district attorney, both at that time practitioners in the state courts; and had they led him into an error, which they certainly did not, it would be the height of absurdity as well as of injustice, to impute it to him as an offence.

I have now, Mr. President, concluded my remarks on those charges, which arise out of the trial of Callender.

[Mr. Harper was proceeding to the next article, when, it being three o'clock, a motion was made to adjourn till the next day. When the question was about to be taken, Mr. Harper observed to the court, that altho' an adjournment would be a personal convenience and gratification to him, yet if his wishes could be at all consulted, he would prefer to conclude his argument on that day: that the time had become very short; which afforded some ground to apprehend that a postponement of the decision till next session might be thought necessary; and that it was, therefore, extremely desirable, and very much desired by his client and himself, to close the argument as soon as possible.

An adjournment for half an hour was then moved and carried.]

When the court met again,

Mr. RANDOLPH said that with the leave of the counsel for the respondent, he would offer one or two observations, which might save that gentleman and the court some trouble. We know, said he, we cannot lay much stress on the testimony of a single man, rebutted by that of another respectable witness. Among

Digitized by Google

the persons summoned to appear, who are able to give evidence of the declaration of Mr. Heath respecting the conversation between judge Chase and Mr. Randolph, are Messrs. Meriwether Jones and Hugh Holmes. Mr. Jones, we are advised, is, from extreme indisposition, unable to attend—Mr. Holmes, the speaker of the House of Delegates, did not attend until since the evidence on the part of the prosecution was closed. That honorable and respectable man is, however, now in the lobby. I only state this circumstance in tenderness to the character of the witness, and that Mr. Holmes is ready to prove that pending the trial of Callender, Mr. Heath did declare to him as having passed in his presence such a conversation as the witness has stated. It is not our wish to press his evidence, because we know that the evidence of a witness thus rebutted can establish nothing material to the prosecution. But we are ready, if the court and counsel for the respondent agree, to receive his testimony.

Mr. HARPER. It is not for us to say how the honorable managers shall proceed in conducting this prosecution. We have no objection to Mr. Holmes being examined; and we feel perfectly indifferent whether Mr. Heath be abandoned or not. Should Mr. Holmes not be examined, I presume it will be understood that he was offered to support the declaration of Mr. Heath.

Mr. *Randolph* said it was not intended to abandon Mr. Heath.

Mr. *Harper* enquired how long Mr. Holmes had been in the city. If correctly informed he had been here three days, and if so, his testimony might have been adduced before the defence on the part of the respondent was made.

Mr. *Randolph* said the not previously offering Mr. Holmes to the court arose solely from an indisposition to interrupt the counsel for the defendant. The character of Mr. Holmes stood too high to be impeached. It was only when they heard the correctness of Mr. Heath's testimony questioned, that the managers deemed it necessary to do that, for the not doing of which

Digitized by Google

they had received the censure of the counsel for the respondent. Mr. Randolph then moved that Hugh Holmes should be sworn.

The *President* said the reasons assigned for the admission of Mr. Holmes's testimony, so far as they arose from tenderness to the character of Mr. Heath, could have no weight with the court. The only question for them to decide was, whether his testimony was or was not material.

Mr. *Nicholson* said he held it to be the right of either party at any stage of the trial, when the evidence of a witness was impeached, to justify it by the testimony of another witness. He asked the receiving, therefore, of Mr. Holmes's testimony as a matter of right, not of favor.

The yeas and nays were taken on examining Mr. Holmes, and were—Yeas 21—Nays 11.

HUGH HOLMES *sworn.*

In answer to an interrogatory put by Mr. *Randolph*,

Mr. *Holmes* replied—I was at Richmond when the circuit court sat there. I am told they sat on the 22d of May, 1800. On the Sunday following I left Richmond. My impression is that Mr. Heath, between Wednesday and Sunday, told me in substance what I understand has been related to this honorable court.—It has been detailed to me, and I cannot trace any difference between it and my recollection.

Mr. *Harper*. Please to state it.

Mr. *Holmes*. It was this. That he (Mr. Heath) had business with judge Chase of a judicial nature, and waited upon him; that while he was there Mr. Randolph came in; that he held a paper in his hand; that the judge asked him what it contained. He replied the pannel of the jury for the trial of Callender. The judge asked if there were any persons of a particular description, I think democrats, on it. Mr. Randolph said there was—The judge then said, no such persons must be on the pannel.

Digitized by Google

Mr. *Harper*. Are you confident that you left Richmond the Sunday following?

Mr. *Holmes*. I think so. It is possible that I may be mistaken. As to the substance of the conversation I cannot be mistaken; though I may as to the time.—Mr. Heath may have given me the account in the following September when I was at Richmond.

Mr. *Nicholson*. Were there any persons present when Mr. Heath gave you this information?

Mr. *Holmes*. I think judge Brookes and Gen. Minor were.

Mr. *Martin*. Did you leave town on the Sunday before or after Callender was tried?

Mr. *Holmes*. I left town before he was tried.

Mr. *Randolph*. I understand you as stating that you are positive as to the substance of the conversation, but not as to the time.

Mr. *Holmes*. I think it was during the first time I was in Richmond; but it may have been during the second time. But I think I may speak positively of the substance of the conversation.

Mr. HARPER—This testimony of Mr. Holmes, Mr. President, completes the overthrow of John Heath, whom it was adduced to support. It adds the last clench to the nail, by which his testimony is fixed on high. This honorable court will recollect that John Heath declared, that as soon as the conversation between judge Chase and the marshal, about striking those "creatures called democrats" from the jury summoned to try Callender, took place, which was in the morning before the court met, he went immediately on the hill, and related that conversation to Hugh Holmes. This, consequently, must have happened before Mr. Holmes left Richmond. He tells us that he left Richmond on Sunday, the 25th May. We know from the record evidence in the cause, as well as from the testimony of Mr. William Marshall and some other witnesses, that Callender was not brought to Richmond until the 27th of May. And it is well known that by the practice of Virginia, a jury is never summoned to

Digitized by Google

try an offender, till he is before the court, and puts himself upon trial. Consequently at the time when John Heath informed Mr. Holmes, that he had seen the marshal present to the respondent the pannel of jurors summoned for the trial of Callender, and had heard the respondent tell the marshal to strike off all the "creatures called democrats," it is perfectly certain that no jury had been summoned; that the marshal had not taken Callender; that it was perfectly uncertain whether he would be taken; and that no such circumstance as Heath related to Mr. Holmes, could possibly have taken place. For this flat contradiction of their witness, we are indebted to the honorable managers, and we tender them our thanks. They have furnished us by the same respectable testimony, with another contradiction of minor importance, but not undeserving of notice. Heath says that he made this communication to Mr. Holmes in the morning. Mr. Holmes states, as his strong belief, that it was made in the evening. So much for the testimony of Mr. John Heath; which I leave without further remark, where it has been placed by Mr. David M. Randolph, Mr. William Marshall, and Mr. Holmes; and proceed to consider the transactions at New-Castle, in Delaware, which form the matter of the seventh charge.

And here three questions present themselves for examination. What was the respondent's conduct on that occasion? How far was that conduct conformable to duty and propriety? What were the motives from which it proceeded? On all the previous articles the same division of the matter presented itself to the mind; but the two first grounds were fully occupied by my learned colleagues. What remained for me belonged almost entirely to the third division. Here, and on the eighth charge, being deprived of their able assistance, it is incumbent on me to consider the subject under each of these three points of view.

As to the conduct of the respondent, he admits in substance that he did, on the first day of the court, decline to discharge the grand jury, on their request; did state to them some information which he had re-

Digitized by Google

ceived, respecting a seditious printer in the town of Wilmington, who was said to be in the habit of violating the act of Congress called the sedition law, and did inform them that it was their duty to enquire into that affair. He also admits that he requested the district attorney to assist them with his advice, in making this enquiry. But he denies that he did utter those expressions relative to a seditious temper in the state of Delaware, or any part of it, with which he is charged.

That he uttered those expressions is sworn by Mr. George Read, the district attorney of Delaware, and Mr. Lee, one of the grand jurors. Four witnesses on the contrary, equally respectable and equally intelligent with Mr. Read and Mr. Lee, have deposed that they were present, that they attended particularly to what passed, and that they heard no such expressions. First, judge Bedford, who sat by the side of the respondent at the time, who must have heard all that was said, and who appears to have remarked particularly what the respondent said on the subject of seditious publications: for he afterwards told him, that he had used expressions which would give offence. Yet judge Bedford did not hear any such expressions, as are stated by Mr. Read and Mr. Lee. Next, Mr. Vandyke, the attorney general of the state of Delaware; a gentleman of high character, whose manner of delivering his testimony proves him to be very capable of accurate observation. He attended in court at this time, and was attentive to the proceedings; but he heard nothing of those remarkable expressions. Then Mr. Hamilton, who attended the court as an assistant to his father, the marshal, sat near the judges, listened to the conversation between the respondent and the jury, but heard nothing of those remarkable expressions. And fourthly, Mr. Hall, who was in court during the whole time, paid particular attention to what passed, but heard nothing of this seditious temper in the state of Delaware, and particularly in the county of New Castle, and more especially in the town of Wilmington. On Mr. Moore so much stress cannot be laid as on the

Digitized by Google

former witnesses, because he was not particularly attentive to what passed on the first day. Laying him, however, out of the case, we have four witnesses against two; and these four witnesses were so situated, that they must have heard those expressions had they been uttered, and must have remarked them. Judge Bedford did remark expressions far less strong, which he was apprehensive might give offence. Is it possible then to believe, that those very offensive expressions, had they fallen from the respondent, could have escaped his notice?

But there is another piece of evidence, still stronger than the testimony of these witnesses. We know that within a day or two after these transactions took place, an account of them was published by the printer, and in the gazette, which had been the object of the respondent's animadversions. The publication is in evidence before the court. It is sufficiently exaggerated, but it makes no mention of those remarkable and offensive expressions. This printer, it is evident, was extremely well disposed to represent the respondent's conduct in the most unfavorable light that truth would justify. He, no doubt, received his information of what passed, from persons who felt the same disposition. Those persons must have heard these expressions had they been uttered, must have been struck by them, and surely would not have suppressed them.

When this mass of evidence stands opposed to Mr. Read and Mr. Lee, can we hesitate to pronounce that they have stated what never took place? I am far from intending to charge them with intentional departure from truth. No doubt they understood in this manner something that was said. But it is plain that there must be a mistake some where. Their testimony can not be reconciled with that of the four witnesses for the respondent; or with that of the printer, which under the circumstances of this case, is stronger than all the rest. And it is much more probable that two men should be mistaken than four; and that all the six should have been mistaken, than that this printer should have been uninformed of, or should have omitted to notice,

Digitized by Google

those expressions, if they had been used by the respondent.

These expressions indeed contain nothing criminal. To have used them would not have been an impeachable offence: but it would have been an act of great indecorum and impropriety. It was the duty of the judge to charge the grand jury; and to point their attention to any specific offences against the laws of the United States, which had come within his knowledge or information: but to utter indiscriminate abuse against a whole state or county, to charge the people of it generally with a seditious temper, would have been equally extra-judicial and unbecoming. This consideration, we hope, will be admitted as an apology, for occupying so much time in the refutation of a charge, which in every other point of view is manifestly frivolous and futile. We wish to rescue the conduct of our honorable client from the imputation of impropriety as well as of guilt.

It may perhaps be replied, that we rely on merely negative testimony, to disprove these expressions, while positive testimony is adduced to prove them. But whether testimony ought to be regarded as positive or merely negative, depends on the situation of the witnesses, and the circumstances of the case. When a man swears that he did not see a transaction, which might have taken place without his seeing it, his testimony is merely negative, and can have no weight against that of a witness, who swears that he did see the transaction. But when it is of such a nature, that it could not possibly, or within the bounds of reasonable probability, have taken place, without being seen by the person who swears that he did not see it, the testimony of such person then assumes the character and possesses the weight of positive testimony. It is the same as if he had sworn positively, that no such transaction did take place. If, for instance, a witness were to swear, that he saw a man standing with his hat on during the whole of this trial, in the open space on the floor between the President and me; and every other person present were to swear, as they no doubt

Digitized by Google

would, that they had seen no such person: Surely no man in his senses would put this on the footing of mere negative testimony, and contend that the first witness was to be believed against all the others! And where is the difference between the two cases. It consists, I answer, solely in the number of witnesses: for it is as impossible that those expressions should have been uttered by the respondent, without being heard by judge Bedford, Mr. Vandyke, Mr. Hamilton, and the persons who gave information to the printer; as that a man should stand for an hour with his hat on, in the middle of this floor, without being observed by the audience.

We are therefore warranted in laying these expressions out of the case; and then to what does it amount? There was a law of the United States for the punishment of seditious libels, which the respondent, as judge of the circuit court of Delaware, was bound to enforce within that district. On his way to the court he receives information, that certain habitual violations of this law are committed within the district. This information is given to him, as appears from the testimony of Mr. Hall, by a justice of the peace for that district, whose duty it was to attend to such offences, and to take all legal steps for bringing the offenders to justice. This information derived from this official and authentic source, the respondent communicates to the grand jury; observing to them that it was their duty to enquire into the matter, and that they must remain in session one day more, for that purpose. He goes further. He requests, or, if the honorable managers will have it so, he orders the district attorney to assist them with his advice in making this enquiry; and directs a file of the newspapers supposed to contain these libellous publications, to be procured and laid before them. This is the "head and front of his offending." And will the honorable managers be pleased to point out the rule or principle of law, that was violated by these acts? Will they be so good as to inform us, whether it was not the duty of the grand jury to enquire concerning offences within the district; and of the

Digitized by Google

judge to give in charge to them all such offences as had come to his knowledge? Suppose that instead of a breach of the sedition law, a piracy had taken place on the high seas, and information had been given to the judge, that the pirates were lurking in the district of Delaware? Would it not have been his duty to state this information to the grand jury, and to direct them to enquire concerning the offence? And I again call on the honorable gentlemen, as I had occasion to do in a former part of the case, to inform us by what authority, and what criterion, a judge is to distinguish some offences from others, to prosecute some, and let others, as far as depends on him, escape with impunity.

The honorable gentleman who opened the case on the part of the prosecution, admitted distinctly, in his opening speech, that a judge may properly be zealous and active, in the execution of the criminal law generally; and he bestowed very high, and probably very just encomiums on a judge of Virginia, whom he represents as thus vigilant, zealous and active. But it is zeal and activity in the execution of this particular law, that he imputes as a crime to the respondent.

But if this zeal and activity of the respondent be not confined to this particular law, of which there is not the least proof or pretence; how, I ask, can it be an offence, according to the principle of the honorable gentleman? Surely each particular law is a part of the whole body of the law; will the honorable gentleman be pleased to inform us how it is impossible to be zealous and active as to the whole, without being so as to each of the parts? Will he inform us how the laws can be executed, except by parts; and whether it ever did or could happen, that they were all violated at once?

There is however a more serious objection to this principle; which, if it be correct, goes to invest the judiciary with a power infinitely more formidable and alarming than has ever yet been contended for, in this, or as far as I know, in any country.

In what part of our constitution, or of our system of jurisprudence, have the honorable gentlemen found

Digitized by Google

this dispensing power of the judges, over a part of the laws? Was not the sedition act, while it continued in force, a law of the land? Were the courts of justice to neglect its execution, because it had been opposed by a political party in the legislature, or was disagreeable to a portion of the people? Are the honorable gentlemen willing to be tried by this their principle? Let them, before they answer in the affirmative, examine how far it will carry them. We now have circuit courts, and associate justices to hold them. We now have, and probably always shall have, parties in Congress and in the country. It is very possible that laws may be passed, which will be highly disagreeable to one of those parties. Are gentlemen prepared to say, that judges may dispense with the execution of all laws, which they may suppose to be of this description? If gentlemen find this principle intolerable and absurd, when applied to laws passed by themselves, will they still insist on its application to such as were heretofore passed against their opinion? Or will they contend that the question, whether a person shall be punished for the violation of a law, shall depend on the popularity or unpopularity of the law, in the particular district where the offence is committed? Is a judge appointed to hold a criminal court, to enquire from the people of the district, or from popular leaders, what laws he shall execute? Ought he to take his information on this subject from political parties, or from the statute book? Would this be living under equal laws, equally, impartially, and steadily administered? And do not such laws so administered, constitute the very essence and definition of free government?

On principle then, even the principle admitted by the honorable gentleman himself who opened the prosecution, the conduct of the respondent in directing the attention of the grand jury to this offence, is strictly justifiable. But it does not rest on principle alone. It is strongly supported by precedent, both in England and this country. In the Lawyer's magazine, an authentic collection of legal proceedings and adjudications, vol. 3, page 333, we find a charge delivered to a grand ju-

Digitized by Google

ry by chief Baron Perryn, in which he calls their attention to certain particular offences. In page 384 of the same book, we find lord Loughborough calling the attention of the grand jury to particular offences. In the fifth volume of the same work, page 199, there appears a charge of judge Ashurst, in which he directs the attention of the grand jury to certain seditious societies. And in the report of Hardy's trial, we see the celebrated chief justice Eyre, as illustrious for his justice, humanity and love of liberty as for his profound knowledge of the law and his great talents as a judge, directing the attention of the grand jury *to* a particular offence.

Passing from England to this country, we see judge Iredell, whose example has so often been held up for imitation, directing the attention of the grand jury in a very particular and emphatical manner, to the particular case of the Northampton insurgents. This took place at the circuit court at which those insurgents were to be tried: and the charge was delivered to the same grand jury, which found the first indictment against John Fries. And we have another authority more directly in point, because it occurred in the case of a supposed libellous publication. It is also furnished by a judge of great legal reputation and talents, whom I trust the honorable gentlemen will not consider as inimical to liberty or disposed to judicial oppression. I mean Mr. M'Kean, formerly chief justice, and now governor of Pennsylvania. In a charge delivered to a grand jury of the city and county of Philadelphia, on the 27th of November, 1797, after a very elaborate and luminous exposition of the law relative to libels, he informs them that a certain printer in that city, meaning Cobbett, the publisher of Porcupine's gazette, was, and long had been in the habit of offending against this law, by the publication of scandalous and malicious libels; that he had interfered and endeavored to arrest the progress of this offender, by binding him over to good behaviour: that the printer, in contempt of his recognizance, and in defiance of the authority of the law, persisted in his mischievous course; and that the duty of

Digitized by Google

arresting him devolved on the grand jury, by whom alone the strong correctives appearing to be necessary could be applied. The expressions used by this learned and able judge are strong and remarkable. I will take the liberty of presenting them to the court in his own dress. (Here Mr. Harper read the charge from Claypole's gazette of November 28th or 29th, 1797.) It will be remarked that the printer in this case had not been bound over to appear at the court, and answer for a libel; but had been bound in a recognizance to be of good behavior, which he was supposed to have violated by publishing further libels. On this recognizance a civil action had been brought; and the grand jury, who had nothing to do with the recognizance, nor any information before them, were thus called upon to apply a further corrective, by presenting the offender.—It is impossible that a case should be more exactly in point. Indeed it goes much farther than the conduct of the respondent at New-Castle.

I am far from condemning or calling in question the conduct of the late chief justice of Pennsylvania, in this instance. But I contend that the same act which has been considered proper in him, ought not to be imputed as a crime to my honorable client.

Thus we see that the conduct of the respondent, in this instance, was strictly correct, whether it be tested by principle or precedent. If this could be doubted, if it were even admitted that he acted incorrectly, it would still be clear that he acted from proper motives; that his error was a mere error of judgment, and consequently cannot be the ground of a conviction on impeachment.

Had he been conscious of improper intentions, how easy was it for him to accomplish his object, without appearing in the business? When Dr. M'Mecken, from whom, as Mr. Hall tells us, the respondent received the information, mentioned these publications to him, it would have been easy for him to request that gentleman to give the information to the grand jury. Dr. M'Mecken no doubt would have complied with the request; the grand jury would have obtained

Digitized by Google

the information; the printer, had it appeared proper to them, would have been presented; and the respondent would have attained his end without in the least exposing himself to view. Would he not have acted thus, had he been conscious of improper designs? With criminal plans of oppression in his mind, would he not have sought concealment, where it was so easily practised, and could in no degree have impeded his projects? Undoubtedly he would. Nothing but a consciousness of upright views could have induced him in such circumstances, to act this frank and open part.

In judging of men's motives, it is material also to listen to their private conversations, addressed at the time to those in whom they have confidence. In such conversations the hearts of the most cautious are apt to expand, and the most hidden plans are sometimes disclosed. What was the respondent's reply to judge Bedford, when that gentleman censured him for acting imprudently in recommending in that part of the country, an enquiry into offences against the sedition law? "My dear Bedford," to use the beautiful language of the respondent as repeated by the witness, "no matter where we are, nor among whom we are; we must do our duty." This, sir, is the language of the heart; not of a corrupt heart, filled with plans of oppression and violence, but of a heart manly, upright and honorable. It bears the intrinsic character, the genuine stamp of sincerity and truth. It is a frank and unstudied avowal of motives, made to a confidential friend in an unsuspecting moment: and it is of more avail than volumes of testimony, to shew the real impressions under which he acted.

Remember too how readily, and in what good humor the respondent gave up this point, and acquiesced in the opinion of the grand jury and the district attorney, when they declared they had found nothing libellous in the papers. Having acted from a sense of duty in calling the attention of the grand jury to the subject, he was content with having discharged his duty, and pressed the matter no further. But had he acted from a vindictive spirit of oppression, or any other improper

Digitized by Google

motive, inducing him to wish for the prosecution of the printer, would he so readily have desisted? The file of papers was within his reach. We, who have examined it, know, that he might have found in it libellous matter enough. And would he not have examined it? Would he not have pointed out the libellous passages to the grand jury? Would he not have sent them out again, with stronger injunctions to do their duty? Do oppressors so readily abandon their projects, when the accomplishment is so much in their power? No, sir. This conduct in the respondent is utterly inconsistent with any other motive, than that sense of duty under which it is manifest that he acted throughout.

We come now, Mr. President, to the eighth charge, under which I find myself again obliged to perform the disagreeable task of contrasting evidence, and controverting the testimony of a witness for the prosecution. This witness, Mr. Montgomery, has attributed to the respondent expressions relative to the character, motives and views of the present administration, which had he uttered them from the bench, ought to draw on him the censure of the public, and the severe animadversion of this tribunal. These expressions I am authorised by him expressly to deny and disclaim. He contends that according to the custom of this country, subsisting for almost thirty years, without any mark of public disapprobation, he had a right to warn his fellow-citizens, in a charge from the bench, against the political dangers by which he believed them to be threatened; to assist in this manner, in averting impending ruin; in snatching the people of his native state, from the abyss in which he thought them about to plunge. He contends, that for this purpose, and according to this custom, he had a right to point out, what he considered as the pernicious tendency of certain measures of the federal government, in order to shew in a stronger light, the danger of adopting similar measures in the state. This is what he did, and what he supposed himself authorised to do. But he neither claims, nor has exercised, the privilege of abuing those who have been appointed to administer the

Digitized by Google

government of his country; nor of passing strictures in his official capacity, on their character, motives, or general conduct. However he may differ from them in political opinion; however he may disapprove their principles; whatever apprehensions he may entertain about the tendency of their measures; he has always inculcated obedience to them, in the exercise of their constitutional powers, and has carefully avoided any remarks, in his judicial character, on their system, views or conduct. When he could not approve their measures he was silent; except in this single instance, where in order to dissuade the people of Maryland from the adoption of a constitutional amendment then under consideration, which he conceived to be fraught with so many evils, he adverted to the consequences likely, in his judgment, to flow from one of those measures. These very reprehensible expressions "that the present administration was weak, incapable, and unequal to the proper discharge of their duties; and "that the object of their measures was not to promote "the public good, but to preserve unfairly acquired "power;" are attributed to the respondent by one witness alone, Mr. Montgomery, of Maryland. How far that witness is entitled to credit, in this particular, it is my duty to enquire.

Let us advert, Mr. President, to the state of mind in which this witness was, at the time when these expressions are supposed to have been uttered.

He informs us that he was the author and chief supporter of those measures of the Maryland legislature, against which the respondent levelled his artillery; that he considered himself as particularly pointed at; and supposed the eyes of the audience to be turned upon him. So greatly was he irritated by this imaginary attack on himself, that as he left the room, after the charge was finished, he declared that the respondent should be impeached for that charge. This we learn from the testimony of Mr. M'Mecken, who heard the declaration. After he went home, he wrote an inflammatory piece for the press, purporting to be the substance of the charge. This piece was avowedly writ-

Digitized by Google

ten, for the purpose of promoting an impeachment. It recommends that measure; abounds with the most opprobrious and abusive language against the respondent; and, what is still worse, it varies very materially from the testimony which the author of it has delivered at this bar.

Is it surprising that a man in this state of mind, should misconceive the truth? Is it to be wondered at that he should convert his own inferences, the misconceptions and distortions of his own brain, into facts? Have any members of this honorable court heard a person give an account in a court of justice of a quarrel in which he himself had been a party? Of a brawl or riot in which he had been himself engaged, in which he had perhaps been beaten, and of his wrongs in which he came to complain? Have they observed how the truth in such situations, is distorted by the blindness of passion, the partiality of self-love, and the thirst of revenge? I presume that they have; and they will then know how to appreciate the testimony of a witness, in the state of mind in which Mr. Montgomery viewed these transactions, and in which he has given evidence at this bar.

I have said that his publication, purporting to be the substance of this charge, varies materially from his testimony in this case. For the truth of this statement I refer to the publication itself, which is in evidence before the court, and to his testimony, which is in the recollection of the honorable members. But I will point out one of the most remarkable variances.

In the publication he represents the respondent as saying, "that in a country where were equal rights and "equal laws, that is laws equally administered, and "that operate equally upon the rich and poor, there "was freedom, but that country was *not* ours; we had *no* equal rights or equal laws." In his testimony, as taken down by the short hand writer, he represents the respondent as saying, "that where there were equal "laws and equal rights, there was freedom, but where "the administration of the laws was partial and not "certain, the people were not free: and that we were

Digitized by Google

"approaching to that state of things." In his publication he accuses the respondent of saying, that we actually were in this condition: in his testimony, that we were approaching to that state of things. Is it possible to give credit to a witness who thus contradicts himself? And what assurance have we that he whose memory is so treacherous, and who is proved, by his publication to have been so angry, has not stated his own impressions and inferences as facts?

This witness has indeed made an attempt to support himself, by an explanation of this part of his testimony. In his explanation he tells us, that although he attributed the word "administration" to the respondent, the term used might perhaps have been "government." In this way he endeavors to get rid of the contradiction between himself and the numerous other witnesses. But this cannot avail him. The expressions, whether applied to the administration or the government, must, in this instance, have meant the same thing. The charges of weakness, relaxation, incapacity, and a view to the continuance of their unfairly acquired power, instead of the public good, could have had no application to the government in its general abstract nature. They could have been applied to it only as administered, by the persons or the party now in power. So that whether the term "government" or "administration" was used, the meaning was precisely the same. The expressions were equally remarkable, in one case as in the other. They must have struck the by-standers as much in one case as in the other. They were in fact the same, with the variance of a single word, which did not in the least vary the sense. The witnesses have all sworn that they heard no such expressions, and the contradiction is as strong after the explanation, as it was before.

Who are these witnesses thus standing opposed to Mr. Montgomery? These witnesses that were present, and attentive, and yet did not hear these remarkable expressions which he heard so distinctly, and which he tells us made so strong an impression on his mind? If, when he stood on his own merits, and on the com-

Digitized by Google

parison between his publication and his testimony, he was so weak, how must he appear, when opposed by this host of witnesses?

First, Mr. Mason. That gentleman, indeed, was so much occupied by the salutations of his friends, that He did not attend accurately to the whole charge; although he had leisure enough to remark what nobody else saw; that the respondent, in the intervals of reading his charge, sometimes seemed to introduce extemporaneous observations, by way of comment on what he read. Still he has given us with great confidence, and no less accuracy, the principal points of the charge. He recollects nothing of these expressions. Can it be believed that they would not have struck him, had they been used? Mr. Mason is one of the strongest adherents, one of the warmest and most zealous friends of those who now administer the government. Indeed he is one of the chief props of the present administration, united with it in interest, principle and affection. He is, moreover, so accurate in his observation, and so correct in his recollection, about what relates to the respondent, as to be able, after a lapse of five years, to repeat a casual, and jocular conversation; which is usually forgotten as soon as it passes. Can it be believed that so outrageous an attack upon his friends, by this judge, and in such a place, could have escaped his notice, or been effaced from his memory?

Next Mr. Smith, Editor of the National Intelligencer, than whom the present administration certainly has not a more zealous friend. He is, indeed, remarkable for the devotedness of his attachment to this administration; his lively and keen sensibility to all its wrongs, real and imaginary; and his vigilant and unwearied zeal in its defence. He is, moreover, remarkable for his talent of stating in writing, whatever he has heard spoken or read; a talent into the careful cultivation and constant exercise of which he is led by his profession. He listened attentively to this charge. After hearing it he sat down in his chamber, the same evening, and committed the substance of it to writing, for the express purpose of publishing it in his paper.

Digitized by Google

This publication he has produced and attested, and it contains no such expressions about the present administration, or the present government, as were heard by Mr. Montgomery. Is it possible to believe that had such expressions been used, they would not have been heard by Mr. Smith; or that if he had heard them, he would have omitted them in his publication?

Mr. Stephen, too, who is known to be strongly attached to the present administration, was present at the delivery of this charge, attended to it, but heard no such expressions as those related by Mr. Montgomery. A multitude of other witnesses who stood round the respondent while he delivered the charge, who were all for various reasons very attentive to it, have with one voice declared that they heard no such expressions. Among them is the district judge, who sat by the side of the respondent; the clerk of the court, who sat next to him but one, and who moreover is an adherent of the present administration; the foreman of the grand jury, who stood close to the respondent, and to whom the charge was particularly addressed; and one of the judges of this district, who attended that court as a witness, and stood very near to the respondent, while he delivered the charge. The others are gentlemen of the bar, men of high character, who have delivered their testimony with great accuracy, and assigned with candor and precision the reasons of their belief. And all these persons declare most positively, that they heard no such expressions as have been related by Mr. Montgomery, about the conduct, character and views of the present administration.

Nay more. The charge was read from a written paper, and that paper is produced in court, and proved by the person who wrote it, from a rough copy furnished by the respondent. Mr. Mason, it is true, states, that some extemporaneous comments appeared to him to be made by the respondent, while reading from the written paper; and the inference to be drawn from this, I presume, is that these expressions might have formed one of these extemporaneous comments, and therefore might have been used, tho' they do not appear in

Digitized by Google

the paper. But Mr. Mason, it will be remembered, tho' very correct and positive in stating the substance, does not pretend to accuracy in the particulars. He was too much interrupted by the salutations of his friends, who pressed through the croud to speak to him. And it may very well have happened that when, after these interruptions, he turned his attention again to the respondent, he sometimes found him with his eyes raised from the paper, as those of every man will be who reads his own composition, or any writing with which he is familiar. This might have led him to conclude, that the respondent sometimes spoke extempore. But Mr. Montgomery himself has stated that the whole charge was read from a paper; and the same fact has been established by the testimony of nine or ten witnesses, among whom are the district judge and the clerk of the court. Those gentlemen sat near to the respondent, while he delivered the charge. One of them sat next to him, and the other next but one. They were both attentive to the manner in which the charge was delivered, and they both say that it appeared to them to be entirely read. They both say that the respondent, in reading it, occasionally raised his eyes from the paper at the close of a sentence, and turned them on the audience; but not longer at any one time than is usual with a person reading. In this the other witnesses fully concur. They all stood round the respondent, had their eyes upon him during the whole time, and were particularly attentive to the manner as well as to the matter of the charge.

Mr. Montgomery, indeed, after he had heard the testimony of Mr. Mason, explained himself on this subject. He said at first, that the whole charge appeared to him to be read from a written paper. But after he heard Mr. Mason state that the respondent, in delivering the charge, sometimes appeared to leave the paper, and introduce extemporaneous matter, he was called again, and he then informed us that his eyes were not constantly directed towards the respondent, but were occasionally turned on the by-standers, whose eyes he observed to be directed to him as the known

Digitized by Google

author of the measures reprobated in the charge. From this he inferred very properly, that the respondent might have spoken extempore from time to time, without his observing the fact. This explanation certainly removes the contradiction which at first appeared between Mr. Mason and Mr. Montgomery; and weakens materially the testimony of the latter gentleman, as to the fact now in question. But it has no such effect on the testimony of the other witnesses, whose attention was not called off like that of Mr. Montgomery; who had their eyes upon this respondent during the whole time; and who firmly believe that every word which he delivered, was read from the paper. This fact, then, I consider as completely established. The paper has been proved, and is in evidence before the court. A true copy of it will be found among the exhibits filed with the answer, No. 8. On examination, it will be found to contain no such expressions as are attributed to the respondent by Mr. Montgomery.

The testimony of Mr. Montgomery on this point, thus liable to suspicion in itself, on account of the state of irritation in which he saw the transaction; thus contradicted by his own written statement, by the testimony of so many witnesses, and by the written charge; is not entitled to belief, but must be laid wholly out of the case. I do not charge him with wilfully mistating the fact; but that he has utterly mistaken it cannot be doubted.

There is another point on which some contrariety appears in the testimony. Some of the witnesses have supposed that the respondent concluded this charge with a direct recommendation to the jury, to use their endeavors on their return home, towards preventing the final passage of the act of assembly of Maryland, for abolishing the Supreme Courts; by procuring in their several counties the election of such persons as would vote against that measure. Others are under the impression, that no such recommendation was expressly made, but was merely to be inferred from the general tenor of the charge. That such a difference of opinion should take place is by no means surprising;

Digitized by Google

but the difference is immaterial. The object of the charge undoubtedly was, to dissuade the people of Maryland from adopting the measure in question; and to impress on the grand jury and the audience, the necessity of exerting themselves against it, at the election which was then approaching and was to decide its fate.

If this recommendation was not expressly given, it was plainly implied. Such was the intention of the respondent; and his defence rests on the correctness of this intention; on his right, according to the long established custom of this country, to pursue the object in this way.

Let the charge, Mr. President, be carefully examined, and it will be found to have no object in view, but to convince the people of Maryland, by arguments drawn from reason and experience, of the danger of adopting a change in their state constitution, which had been submitted to their consideration, and the object of which was to abolish all their supreme courts of law; to introduce a system entirely new and untried; and above all to destroy the independent tenure of judicial office, secured to them by their existing constitution; and to leave the judges dependant on the executive for their continuance in office, and on the legislature for their support. The respondent who had contributed largely to the formation and establishment of the state constitution, was greatly alarmed at these changes. He considered them as of the most destructive tendency to the liberty and happiness of the state to which he belonged; and he resolved to take this opportunity of warning his fellow-citizens against them. This is the whole scope of his address to the grand jury, to shew the importance of an independent judiciary, the dangerous tendency of changes already made, and the mischiefs which would result from taking this additional step in the career of innovation. He did, indeed, advert to the act of Congress for repealing the circuit court law, and remarked that it had shaken to its foundation the independence of the Federal judiciary: but the manifest and sole object of this was, to shew that the spirit of innovation had gone forth, and ought to be

Digitized by Google

carefully watched; that the public respect for great constitutional principles had begun to be weakened; and that by how much the security which might have been derived from an independent Federal judiciary, had been diminished, by so much the more vigilantly it behoved us to guard our state institutions. No other object can be discovered in the charge, or inferred from its general tenor, or from the language in which it is expressed; neither is there any evidence which has the most remote tendency to shew, that he had any other object in view. And was not this an object which a citizen of this country might lawfully pursue? Is it not lawful for an aged patriot of the revolution to warn his fellow-citizens of dangers, by which he supposes their liberties and happiness to be threatened? Or will it be contended that a citizen is deprived of these rights, because he is a judge? That his office takes from him the liberty of speech, which belongs to every citizen, and is justly considered as one of our most invaluable privileges? I trust not. And if there could be any doubt on this point, I would remove it by referring to a recent instance, of two judges of the supreme court of Maryland, who in a late political contest, entered the lists as champions for the rival candidates, and travelled over a whole county, making political speeches in opposition to each other. Yet these gentlemen justly possess the confidence and respect of the public; their conduct in this instance has never been considered as a violation of duty; and he who espoused the interest of the successful candidate, has been far from receiving any marks of displeasure from the government of this country.

If, therefore, a judge retain this right, notwithstanding his official character; if it still be lawful for him to express his opinions of public measures, to oppose by argument such as are still pending, and to exert himself for obtaining the repeal, by constitutional means, of such as have been adopted; I ask what law forbids him to exercise these rights, by a charge from the bench? In what part of our laws or constitution is it written, that a judge shall not speak on politics

Digitized by Google

to a grand jury? Shall not advance, in a charge from the bench, those arguments against a public measure, which it must be admitted that he might properly employ on any other occasion? Such conduct may perhaps be ill-judged, indiscreet, or ill-timed. I am ready to admit that it is so; for I am one of those who have always thought, that political subjects ought never to be mentioned in courts of justice. But is it contrary to law? Admitting it to be indecorous and improper, which I do not admit, is every breach of decorum and propriety a crime? The rules of decorum and propriety forbid us to sing a song on the floor of Congress, or to whistle in a church. These would be acts of very great indecorum, but I know of no law by which they could be punished as crimes. Will they who contend that it is contrary to law, for a judge to speak of politics to a grand jury, be pleased to point out the law of the land which forbids it? They cannot do so. There is no such law. Neither is there any constitutional provision or principle, or any custom of this country, which condemns this practice.

And will this honorable body, sitting not in a legislative but a judicial capacity, be called on to make a law, and to make it for a particular case which has already occurred? What, sir, is the great distinction between legislative and judicial functions? Is it not that the former is to make the law, for future cases; and that the latter is to declare it, as to cases which have already occurred? Is it not one of the fundamental principles of our constitution, and an essential ingredient of free government, that the legislative and judicial powers shall be kept distinct and separate? That the power of making the general law for future cases, shall never be blended in the same hands, with that of declaring and applying it to particular and present cases? Does not the union of these two powers in the same hands, constitute the worst of despotisms? What, sir, is the peculiar and distinguishing characteristic of despotism? It consists in this, sir, that a man may be punished for an act, which when he did it, was not forbidden by law. While, on the other hand,

Digitized by Google

it is the essence of freedom, that no act can be treated as a crime, unless there be a precise law forbidding it, at the time when it was done.

It is this line which separates liberty from slavery: and if the respondent be condemned to punishment for an act, which far from being forbidden by any law of the land, is sanctioned by the custom of this country for more than twenty years past, then have we the form of free government, but the substance of despotism.

Let gentlemen, before they establish this principle, recollect that it is a two edged-sword. Let them remember, that power must often change hands in popular governments; and that after every struggle, the victorious party comes into power, with resentments to gratify by the destruction of their vanquished opponents, with a thirst of vengeance to be slaked in their blood. Let them remember, that principles and precedents, by which actions innocent when they were done may be converted into crimes, are the most convenient and effectual instruments of revenge and destruction, with which a victorious party can be furnished. Let them beware how they give their sanction to principles, which may soon be turned against themselves; how they forge bolts which may soon be hurled on their own heads. In a popular government, where power is so fluctuating, where constitutional principles are therefore so important for the protection of the weaker party against the violence of the stronger, it above all things behoves the party actually in power, to adhere to the principles of justice and law; lest by departing from them they furnish at once the provocation and the weapons, for their own destruction.

I have stated, Mr. President, that the practice of introducing political matter into charges to grand juries, has been sanctioned by the custom of this country, from the beginning of the revolution to this day. Need I adduce any other proof of the fact than its general notoriety? Need I refer to the charge delivered in South Carolina, in 1776, by William Henry Drayton, for which he has been so much admired and applauded?

Digitized by Google

Need I refer to the recommendation of the executive council in Pennsylvania, at a period something later, in which that body, with John Dickinson at its head, enjoins it on the judges, to avail themselves of their charges to the grand juries on their circuits, for disseminating correct political information and principles among the people? Shall I refer to the case of judge Addison in Pennsylvania, who has delivered many political charges, and against whom when he was lately impeached, those charges made no part of the accusation? Shall I refer again to the charge of judge Iredell, delivered to the grand jury, which found the first indictment against John Fries, and containing a variety of political matter? It is unnecessary to dilate on these instances. They have been given in evidence, and are fresh in the memory of this honorable court. The recollection of the honorable members must furnish them with many others equally striking.

And yet have the authors of none of these political charges been censured. No mark of public or private disapprobation has been fixed on their conduct. No legislative act has forbidden this practice. From the time of judge Drayton to the time of judge Chase, it has been considered as innocent. It remained for the year 1803, after a lapse of twenty seven years, to discover its criminality. But this honorable body will not so determine. It will not forget the distinction between its judicial and its legislative character. In its judicial character it will declare, that an act, however improper in itself or dangerous in its tendency, shall not, if forbidden by no law, be punished as a crime; that the prevalence of this custom for twenty years, the countenance which it received from some governmental authorities, and the acquiesence of all, are sufficient evidence of its legality; and that the criminal intent which constitutes an essential ingredient of the offence, in this as well as in every other case, and of which no direct proof is now adduced, can never be inferred from the act itself, when done in compliance with a custom so long established, and so highly sanctioned. But if the members of this tribunal should be individually of

Digitized by Google

opinion, that this custom is dangerous or improper, they will, after pronouncing a sentence of acquittal in this case, resume their legislative character, and pass a law to restrain the practice in future. Thus will the mischief be prevented on one hand, and the principles of liberty and justice respected on the other.

This charge, therefore, fails like the rest, and what remains of the accusation? It has dwindled into nothing. It has been scattered by the rays of truth, like the mists of the morning, before the effulgence of the rising sun. Touched by the spear of investigation, it has lost its gigantic and terrifying form, and has shrunk into a toad. Every part of our honorable client's conduct has been surveyed; all his motives have been severely scrutinized; all his actions have been brought to the test of law and the constitution; his words, and even his jocular conversations, have been passed in strict review; and the ingenuity and industry of the honorable managers have proved unable to detect one illegal act, one proof, or one fair presumption of improper motive.

Perceiving, perhaps, by anticipation, this desperate situation of his case, the honorable gentleman who opened the prosecution, has devised another expedient to escape from anticipated defeat, and to secure that conviction on which he seems to have set his heart. He has told us, and no doubt will hereafter insist, that in order to form a true judgment on the respondent's conduct, the whole of it must be embraced in one view; and all the particulars regarded as parts of one whole. This means, if it means any thing, that although no single act alledged in the articles, should be considered as an impeachable offence, and a sufficient ground of conviction, yet all the acts taken together may constitute such an offence. That is, in other words, that many nothings may make something; that many noughts may make an unit: that many innocent acts may make a crime. What is this but recurring, in another form, to the absurd and monstrous doctrine, that judges may be removed on impeachment for reasons of expediency, without the proof of any specific of-

Digitized by Google

fence? No, sir! This last subterfuge will not avail the prosecutors. This honorable court, adhering to the principles of the constitution, the positive rules of law, and the plain dictates of justice and common sense, will require, before it convicts, the clear proof of a criminal intent, manifested and carried into effect, by some act done in violation of the laws. Under the shield of this great principle, our honorable client stands secure. In full confidence that you, Mr. President, and the members of this honorable court will be guided by it, I cheerfully submit the case to you; and when you retire to deliberate on it, remember that posterity will sit in judgment on your conduct; that her decision will be pronounced on the testimony of impartial history; and that from her awful sentence there lies no appeal.

TUESDAY, February 26.

THE Court opened at about half past ten o'clock, A. M. the Managers, the House of Representatives, and the Counsel of the respondent having taken their seats,

Mr. NICHOLSON, as one of the managers, addressed the court in reply to the counsel of the accused. He said the House of Representatives having impeached Samuel Chase, one of the associate justices of the Supreme court of the United States, of high crimes and misdemeanors; the evidence on their part having been adduced, and that on behalf of the accused, and the arguments of his counsel having been fully and patiently heard, it now became his duty to reply in support of the impeachment. To me, Mr. President, said he, this duty is an unpleasant one. Upon all occasions and under all circumstances, the office of a public accuser is the most painful that can be imposed on us; but it is more peculiarly so when the object of accusation appears before us, covered with age and infirmities. I think I speak the sentiments of my brother

Digitized by Google

managers and of the House of Representatives, when I say, that this impeachment never would have been instituted, that it never would have arrived at its present crisis, if we had not believed that the best interests of our common country required, that the conduct complained of should not go unpunished. There is no nation on earth, sir, in which the freedom of man and the consequent happiness of society are not inseparably interwoven with the full, free and impartial administration of justice.

"*Una salus ambobus erit commune periculum.*"

It was to preserve this unity of safety, to avert this common danger, that we thought ourselves bound by the most solemn obligation, to bring these charges before the highest tribunal of the nation. We may in vain make laws to secure our property, to protect our liberty and to guard our lives, if those to whom we appeal, and to whose decress we are bound to submit, shall prove unfaithful in the discharge of their duty. If our laws are not faithfully administered; if the holy sanctuary of our courts is to be invaded by party feeling; if justice shall suffer her pure garment to be stained by the foul venom of political bigotry, we may indeed boast that we live in a land of freedom, but the boast will be vain and illusory.

In this point of view, therefore, this cause may justly be called an important one. I need not however urge its importance to the court, for the feelings of every honorable member will speak its importance more forcibly than any thing that I can utter. But I do trust that those frequent appeals which you have heard, those frequent instances in which you have been reminded that posterity will pass between the accused, his accusers and his judges, will have no influence on your minds. A desire to secure the approbation of posterity is an honorable feeling pervading every human breast, and is almost inseparable from our nature: but to secure the approbation of posterity, we must take care to pursue the dictates of our own consciences, and by doing justice here, trust to posterity to do us justice too.

Digitized by Google

Our country it is true are now looking on with anxious solicitude for the event of this cause; but the sentence which they shall pass will not depend upon the judgment given here.—To the world and to posterity the conviction of the accused, by this court, will not establish his guilt; and I thank God, as the case has been put in issue between us, his acquittal will not prove his innocence. The facts in the cause, sir, those facts which we have proved by the most undeniable evidence, and upon which your judgment must be given; those facts will be presented to the eyes of the world and of posterity, and upon those only will they decide. If it should ever be the fortune of my humble name to descend to posterity, by the vote which I gave for instituting this impeachment, and by my conduct in discharging the great duty now committed to me, I cheerfully consent to be tried. To this awful tribunal I willingly submit. If the judge is guilty, posterity will heap on him all that odium which his guilt deserves, if he is innocent, let that odium be turned upon his accusers.

Because *Sidney* and *Russell* bled upon a scaffold, have their names been less the objects of veneration with posterity; and because *Scroggs* and *Jeffries* escaped the punishment due to their crimes, have they therefore been less the objects of universal execration? No, sir; and the honorable counsel (Mr. Hopkinson) who first addressed you on behalf of the accused, gave us himself a memorable example of the poor respect which posterity will feel for the decisions of those who have gone before them. That honorable gentleman told you that *Warren Hastings* was impeached for the *murder of princes* and the *plunder of empires*,—and yet that he was acquitted. But is there any who hears me that believes he was innocent?—If we read the history of that trial; if we look to the facts charged, and listen to the unexampled eloquence by which they were supported, our only wonder will be, that he was not condemned. Sir, it has been said, that those *plundered millions* were the best witnesses to prove his innocence; and I greatly fear that the day will come, when the *crying blood* of those *murdered princes* will be the best witnesses to

Digitized by Google

prove his guilt, The most splendid action in Edmund Burke's life was his accusation of Warren Hastings; the foulest stain upon the national justice of England, was his acquittal.

We have been charged, sir, by one of the honorable counsel, (Mr. Harper) with having endeavored to enlist on our side the sympathies of the court. Permit me to ask what sympathy have we endeavored to excite.? What feelings have we endeavored to engage? To what passion have we addressed ourselves? None, sir. We came here to demand justice. The constitution has placed in your hands the power of punishing guilt; we have proved the guilt of the person accused, and at your hands we demand his punishment.—To your consciences, and your understandings we appeal, and not to your feelings. These have been assailed by our adversaries. They have exhibited their client to you, covered as they say, with the frost of seventy winters, and have endeavored to hide the magnitude of his crimes, in the length of his years, and the infirmity of his health. In attempting to excite your compassion, they have wished to drown the voice of justice, and have addressed you, not as judges, but as men. I do trust, however, that if any sympathy is to be excited, it will be neither for the accused, nor his accusers. Let your feelings be turned towards the nation! Let your sympathy be awakened for those who are to come after you, for by the sentence which you pronounce in this case, it must ultimately be determined whether justice shall hereafter be impartially administered, or whether the rights of the citizen are to be prostrated at the feet of overbearing and tyrannical judges. We, who are engaged in this prosecution, feel that our fathers handed down to us a glorious birthright, and we appear at this bar to demand that it be transmitted to our children, unimpaired, and unpolluted. Do the nation justice, and you will do justice to us, to yourselves, and to posterity.

We were also told by the honorable counsel for the accused, that when we found the accusation shrunk from the testimony, and that the case could no longer be

Digitized by Google

supported, we resorted to the forlorn hope of contending that an impeachment was not a criminal prosecution, but a mere inquest of office. For myself I am free to declare, that I heard no such position taken. If declarations of this kind have been made, in the name of the managers I here disclaim them. We do contend that this is a criminal prosecution, for offences committed in the discharge of high official duties, and we now support it, not merely for the purpose of removing an individual from office, but in order that the punishment inflicted on him may deter others from pursuing the baneful example which has been set them.

Nor do we mean to take another ground which the counsel for the accused have thought proper to assign us, for we never entertained the most distant idea, that *any citizen* might be impeached. It was with no little surprize that I heard such doctrines ascribed to us, and I was astonished to hear the attorney general of Maryland combating positions which we had not laid down, and searching for argument to prove that which we should not have hesisated to admit.

But, sir, there is one principle upon which all the counsel for the accused have relied, upon which they have all dwelt with great force, and to the maintenance of which they have directed all their powers, that we cannot assent to—we mean to contend against it, because we believe it to be totally untenable, and because it is of the first importance in the decision of the question now under discussion. We do contend that to sustain an impeachment, it is not necessary to shew that the offences charged are of such a nature as to subject the party to an indictment, for the learned counsel have said that the person now accused is not guilty, because the misdemeanors charged against him are not of a nature for which he might be indicted in a court of law.

To shew how entirely groundless this position is, I need only pursue that course which has been pointed out to us by the respondent himself, and his counsel. I might refer to English authorities of the highest respectability, to shew that officers of the British government have been impeached for offences not indictable under

Digitized by Google

any law whatever. But I feel no disposition to resort to foreign precedents. In my judgment the constitution of the United States ought to be expounded upon its own principles, and that foreign aid ought never to be called in. Our constitution was fashioned after none other in the known world, and if we understand the language in which it is written, we require no assistance in giving it a true exposition. As we speak the English language, we may indeed refer to English authorities for definitions, as we should refer to English dictionaries for the meaning of English words; but upon this as upon all other occasions where the principles of our government are to be developed, I trust that the constitution of the United States will stand upon its own foundation, unsupported by foreign aid, and that the construction given to it will be, not an English construction, but one purely and entirely American.

The constitution declares, that "the judges both of the supreme and inferior courts shall hold their commissions during *good behavior*." The plain and correct inference to be drawn from this language is, that a judge is to hold his office so long as he demeans himself well in it; and whenever he shall not demean himself well, he shall be removed. I therefore contend that a judge would be liable to impeachment under the constitution, even without the insertion of that clause which declares, that "all civil officers of the United States shall be removed for the commission of treason, bribery, and other high crimes and misdemeanors." The nature of the tenure by which a judge holds his office is such, that for any act of misbehavior in office he is liable to removal. These acts of misbehavior may be of various kinds, some of which may indeed be punishable under our laws by indictment; but there may be others which the law makers may not have pointed out, involving such a flagrant breach of duty in a judge, either in doing that which he ought not to have done, or in omitting to do that which he ought to have done, that no man of common understanding would hesitate to say he ought to be impeached for it.

Digitized by Google

The words "*good behavior*," are borrowed from the English laws, and if I were inclined to rest this case on English authorities, I could easily shew that in England these words have been construed to mean much more than we contend for. The expression *durante se bene gesserit*, I believe first occurs in a statute of Henry VIII. providing for the appointment of a *custos rotulorum*, and clerk of the peace for the several counties in England. This statute recites, that ignorant and unlearned persons had by unfair means procured themselves to be appointed to these offices to the great injury of the community, and provides that the *custos* shall hold his office until removed, and the clerk of the peace shall hold his office *durante se bene gesserit*. The reason then for making the tenure to be during good behavior was, that the office had been held by incapable persons, who were too ignorant to discharge the duties; and it was certainly the intention of the legislature that such persons should be removed whenever their incapacity was discovered. Under this statute, therefore, I think it clear that the officer holding his office during good behavior, might be removed for any improper exercise of his powers, whether arising from ignorance, corruption, passion or any other cause. To this extent however we do not wish to go. We do not charge the judge with incapacity. His learning and his ability are acknowledged on all hands;—but we charge him with gross impropriety of conduct in the discharge of his official duties, and as he cannot pretend ignorance, we insist that his mal-conduct arose from a worse cause.

If, however, a judge were not made liable to removal from the very nature of the tenure by which he holds his office, we still insist that every judge conducting himself improperly in office, comes under that clause of the constitution which declares, that "the President, Vice-President, and civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Digitized by Google

We do not mean to contend against a position which one of the learned counsel took so much pains to prove, that the word *high* applies as well to misdemeanors as to crimes; nor do we deem it important at this time to enquire whether a civil officer of the United States can be removed for offences not committed in the discharge of his official duties. It will be time enough to make this enquiry when the case presents itself. At present we aver that the party charged has been guilty of a high misdemeanor in office, and that he ought to be removed for it.

Here however we are met by being told, that altho' his conduct may have been improper, yet that he is not liable to impeachment, unless the offence was of such a nature, as that he might be indicted for it in a court of law.

If this be true as it relates to a judge, the constitution, to be consistent with itself, must make it universally true; and yet if the doctrine be admitted, the constitution will be found to be at variance with itself. *Treason* is an offence which may or may not be committed in the discharge of official duty, and no doubt the party committing it may be indicted. *Bribery* is an offence for which a judge may be indicted in the courts of the United States, because an act of Congress makes provision for it, and declares the punishment; but there is no law by which any other officer of the United States can be indicted for bribery. If, therefore, the President of the United States should accept a bribe, he certainly cannot be indicted for it, and yet no man can doubt that he might be impeached. If one of the Heads of Departments should undertake to recommend to office for pay, he certainly might be impeached for it, and yet I would ask under what law, and in what court could he be indicted?

To this perhaps it might be answered, that bribery is one of those offences for which the constitution expressly provides, that the officer may be impeached—This is true, but let us proceed further, and enquire whether there are not other offences for which an officer may be impeached, and for which he cannot be indicted.

Digitized by Google

If a judge should order a cause to be tried with eleven jurors only, surely he might be impeached for it, and yet I believe there is no court in which he could be indicted. You, Mr. President, as Vice-President of the United States, together with the Secretary of the Treasury, the Chief Justice and the Attorney General, as Commissioners of the sinking fund, have annually at your disposal eight millions of dollars, for the purpose of paying the national debt. If instead of applying it to this public use, you should divert it to another channel, or convert it to your own private uses, I ask if there is a man in the world who would hesitate to say that you ought to be impeached for this misconduct? And yet there is no court in this country in which you could be indicted for it. Nay, sir, it would amount to nothing more than a breach of trust, and would not be indictable under the favorite common law.

But, sir, this ground, which was so strenuously fought for, will probably be abandoned, and instead of our adversaries maintaining that the offence must be of an indictable nature, they will, like one of the honorable counsel, (Mr. Harper) go a step back, and say that it must be a breach of some known positive law. Thus they will endeavor to shelter their client by saying that there is no act of Congress declaring it illegal for a judge to deliver his opinion on the law before counsel have been heard, or to make political harangues from the bench.

There are offences for which an officer may be impeached, and against which there are no known positive laws. It is possible that the day may arrive, when a President of the United States, having some great political object in view, may endeavor to influence the legislature by holding out threats or inducements to them. A treaty may be made, which the President with some personal view may be extremely anxious to have ratified—The hope of office may be held out to a Senator; and I think it cannot be doubted, that for this the President would be liable to impeachment, although there is no positive law forbidding it. Again, sir; a member of the Senate, or of the House of Representatives

Digitized by Google

may have a very dear friend in office, and the President may tell him unless you vote for my measures, your friend shall be dismissed. Where is the positive law forbidding this, yet where is the man who would be shameless enough to rise in the face of his country and defend such conduct, or be bold enough to contend that the President could not be impeached for it?

It was said by one of the counsel that the offence must be a breach either of the common law, a state law, or a law of the United States, and that no lawyer would speak of a misdemeanor, but as an act violating some one of these laws. This doctrine surely is *not* warranted, for the government of the United States have no concern with any but their own laws. In a state court, I would speak of a misdemeanor as an offence against a state law; in the courts of the United States, I would speak of it as an offence against an act of Congress; but, sir, as a member of the House of Representatives, and acting as a manager of an impeachment, before the highest court in the nation, appointed to try the highest officers of the government, when I speak of a misdemeanor, I mean an act of official misconduct, a violation of official duty, whether it be a proceeding against a positive law, or a proceeding unwarranted by law.

If the objection that the offence must be of an indictable nature, or against some positive law, means any thing, it must be that the misconduct for which a judge or any other officer may be impeached, is either made punishable by, or is a violation of an act of Congress, for we are not to be regulated either by the common law or a state law. What then would be the result? I have pointed out several instances of gross misconduct, in violation of no act of Congress, and yet under this doctrine, he is to be permitted to pursue his wicked courses until every possible offence is defined by statute. This too would teach us that we have done wrong heretofore; for at the last session a judge was impeached and removed from office for drunkenness and profane swearing on the bench, although there is no law of the United States forbidding them. Indeed I

Digitized by Google

do not know that there is any law punishing either, in New-Hampshire, where the offence was committed. It was said by one of the counsel that these were indictable offences. I however do not know where—certainly not in England. Drunkenness is punishable there by the ecclesiastical authority, but the temporal magistrate never had any power over it, until it was given by a statute of James I. and even then the power was not to be exercised by the courts, but only by a justice of the peace, as is now the case in Maryland, where a small fine may be imposed.

But the attorney general of Maryland, (Mr. Martin) admits that offences may be of so heinous a nature that their punishment carries infamy with them, and that though not committed in the discharge of official duty, yet if against a state law, the party may be impeached and removed from office. This though not very material to the present question, may serve us in shewing how inapplicable the doctrine is, that the offence must be against a state law or the common law. I will suppose that in New-Hampshire there is no law punishing profane swearing—In Maryland a magistrate is authorized to impose a fine of thirty-three cents, and if this is not paid instantly, the offender may be put in the pillory and receive thirty-nine lashes. The punishment is infamous, and if inflicted on a judge, according to the idea of this gentleman, he is to be impeached and removed from office. If the same offence is committed in New-Hampshire, the judge is not to be removed, not because he has been guilty of a lighter offence, but because there is no state law punishing it. If then the state law is to be made the criterion, a judge in Maryland is to be removed from office for that which he might do with impunity in another state.

To carry this idea a little further—There was once in the state of Connecticut, and may be yet for aught I know, a celebrated code called the *Blue laws*. Under the provisions of this code, I believe it is a fact, that a captain of a ship was tied up and publicly whipped, because, on returning from a long voyage, he met his wife on a *Sunday* at the front door and kissed her. This

Digitized by Google

was deeemed a high offence, and was ignominiously punished. Now if we are to be governed by the state laws, I trust the blue laws of Connecticut will be rejected, and that our grave judges may be allowed to kiss when and where they please, as to their wisdom shall seem meet, without incurring the pains and penalties of an impeachment. This, sir, may be somewhat ludicrous, but I hope it is not therefore the less illustrative of the absurdity of the doctrine contended for. It has been said that the offences for which a judge or other officer is to be impeached, ought to be defined by act of Congress. This *is impossible*. Such is the multiplicity of passions that sway the human heart; such is the variety of human action, that a code of laws never did and never can exist, in which all human offences are defined. The constitution is sufficiently definite, when it declares that a judge shall hold his office during *good behavior*, and that all civil officers shall be removed for *high crimes and misdemeanors*. The law of good behavior is the law of truth and justice. It is confined to no soil and to no climate. It is written on the heart of man in indelible characters, by the hand of his Creator, and is known and felt by every human being. He who violates it, violates the first principles of all law. He abandons the path of rectitude, and by not listening to the warning voice of his *conscience*, he forsakes man's best and surest guide on this earth. The best and ablest judge will often err in mere matters of law, but as to principles of duty, in discharging acts of common justice to his fellow men, he can never err so long as he follows conscience as his guide, and suffers justice to be the only object which he has in view.

How far judge Chase has governed himself by this great, unerring rule of human action, it is your province to determine;—how far he has excused himself by his answer and the arguments of his counsel, I shall now beg leave to examine, premising at the same time, that it is my intention to confine myself to the first article.

It has been alledged by the counsel for the accused, that my honorable colleagues have argued this case up-

Digitized by Google

on the articles and not upon the evidence; and this allegation contains an admission, that if the articles are proved, the guilt of the party is established. It shall be my endeavor to shew that there is no material variance between the charges as laid in the articles, and the evidence brought to support them; but that they are amply and fully proved by the very best testimony which could be adduced.

One of the learned counsel in commenting upon the first article declared that he discovered but a single truth in it, which was, that the judge had formed and reduced to writing an opinion upon the law; and that gentleman as well as the attorney general of Maryland labored with great zeal, and with much display of talent, to convince the senate that there could be nothing wrong in this. Unfortunately for these learned gentlemen, *even* that truth is not to be found in it; for by recurring to the article it will be found that the judge is not charged for having formed an opinion, or for having reduced that opinion to writing, but for "having *delivered an opinion* in writing on the question of law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the prisoner, *before counsel had been heard in his defence.*"

In this we find no charge against him for having formed an opinion, or for having reduced it to writing, and certainly the learned counsel might have spared themselves the trouble of proving what I am sure every member of the court was fully convinced of before, that there was no impropriety in a judge's forming an opinion on any subject whatever, whether legal or philosophical. It is not however unusual for skilful advocates to attempt to draw the attention from the material points in dispute, for the purpose of fixing it on others of little or no importance. Such has been the course pursued by our adversaries. But, Mr. President, the real charge is, that Samuel Chase did, upon the trial of John Fries for treason, endeavor to prejudice the minds of the jury against him, by *delivering* an opinion to them upon the law, before his counsel were

Digitized by Google

heard; and this too in a case of life and death, where the jury had an ample, uncontrolable right to decide as well the law as the fact. It is the right and duty of judges to inform their minds upon all questions of law whatsoever, but it is an unwarrantable proceeding, it is an unauthorised assumption of power in them, to deliver that opinion to the jury in a criminal cause, before the jury is sworn, and before the counsel of the prisoner have been heard in his defence.

I did not expect to hear the fact denied by the counsel, but I did expect to hear it would be admitted, and attempted to be justified. This, however, has *not* been done; and they have pretended to deny the fact by insisting on an impossibility; I had almost said an absurdity. They have declared that judge Chase did not make the opinion known, but that it became public by what they call the warm and improper conduct of Mr. Lewis. Sir, it is impossible. What are the facts, as proved even by their own witnesses? That judge Chase handed the written opinion down to the bar. That it was put into the hands of Mr. Lewis, who without reading it, immediately and disdainfully threw it from him, declaring *that his hand should never be tainted by receiving a prejudged opinion in any case.* How then I ask was it made known by Mr. Lewis? He refused to read it, and threw it from him with the correct feeling and indignation naturally arising from a high sense of the injury done to his client. No, sir, it was made public by judge Chase, as I will presently prove beyond the possibility of doubt, in the hearing of the whole pannel of jurors. But permit me here to meet one of the honorable counsel (Mr. Harper) upon that ground, to which he defied my friend who first opened this cause, (Mr. Randolph.) The learned counsel avails himself, he says, of the difference between a general opinion and a direct application of the law to a particular case, and insists that judge Chase's was nothing more than an opinion upon the law generally. Here I meet him, and if I do not prove that the judge delivered the opinion; that he applied it in the most direct terms to Fries's case; that he knew there was no controversy about the

Digitized by Google

facts, and of course that the defence must rest upon the construction which the jury would give to the constitutional definition of treason; that he publicly pronounced the opinion so as to make an impression not only upon the jury, but upon the by-standers; if I do not prove all this, then I will agree to surrender this article, and indeed the whole impeachment.

In order to prove this, I might rest satisfied with referring the Senate to the clear and pointed testimony of Mr. Lewis, Mr. Dallas and Mr. Tilghman. But as Mr. Rawle and Mr. Meredith do not recollect so much as these other gentlemen, and it has therefore been argued that the former must be mistaken, because it is said that their warmth at the moment gave a colouring not warranted by the facts, I shall not rely *solely* on the information derived from them. But I mean to shew, that Mr. Lewis and Mr. Dallas are supported in their statement by the judge himself, while Mr. Rawle and Mr. Meredith are pointedly contradicted by him. In truth, sir, it would seem as if the counsel for the accused had entirely forgotten that he had ever filed an answer, or they had never read it. We alledge that the judge delivered the opinion, and that he applied it directly to Fries's case in the hearing of the jury; they deny this. We have proved it by Mr. Lewis and Mr. Dallas, they rely on Mr. Rawle and Mr. Meredith who do not recollect it. Let us hear the judge himself.

In the 14th page of the answer the judge says "it was for these reasons that on the 22d of April, 1800, (acknowledged by all to be the first day of this memorable transaction,) when the said John Fries was brought into court, *and placed in the prisoner's box for trial*, but before the jury was impannelled to try him, this respondent informed the above mentioned William Lewis, one of his counsel, the aforesaid Alexander James Dallas not being then in court, *that the court had deliberately considered the indictment against John Fries for treason, and the three overt acts of treason stated therein:* that the crime of treason was defined by the constitution of the United States: that as the Federal legislature had the power to make, alter or repeal laws,

Digitized by Google

so the judiciary only had the power to declare, expound and interpret the constitution and laws of the United States."

Here then we find the attention of the counsel and of every body else, called in open court to the case of John Fries, and all the witnesses agree, that the jury though not *then* sworn, were in the box for that purpose, as might naturally be supposed when the prisoner was brought in for trial. We find too that the court had deliberately considered the indictment and the three overt acts of treason charged in it—Now let us see what the result of that consideration was: in the 15th page of the answer the judge proceeds with the statement then made by him from the bench, in which he declared, "that the question, what acts amounted to treason, was a question of law, and had been *decided by judges Paterson and Peters in the cases of Vigol and Mitchel, and by judges Iredell and Peters in the case of* * *John Fries, the then prisoner at the bar, in April* 1799. That judge Peters remained of the same opinion which he had twice before delivered, and *he, this respondent, on long and great consideration, concurred in the opinion of judges Paterson, Iredell and Peters.*"

What opinion was it that judges Iredell and Peters had before given, and in which judge Chase then publicly declared that he concurred? Why, that the overt acts charged in the indictment against Fries did amount to treason, for upon those very overt acts, the judge himself admits Fries had before been tried in April 1799, when these same acts were decided by judges Iredell and Peters to amount to treason, and in this opinion judge Chase then declared that he himself concurred. Here then was a full expression of the opinion. Here it was publicly pronounced in the hearing of the jury, in the face of the prisoner, before his counsel were heard in his defence, and so eager was the judge

* Fries had been tried in April, 1799, for the same offences, and had, under the direction of the court, been convicted of treason; but this last was a new trial, granted in consequence of supposed prejudice in some of the jurors who sat in the former trial.

Digitized by Google

to make it known that he could not even wait until the jury was sworn. Here too was a direct application of the law to the case of John Fries, then about to be tried for treason, by which application of the law, the fate of the prisoner was fixed, and all hope of life entirely cut off.

But gentlemen say that no opinion was given as to facts. True, sir, for he perfectly knew that there was no controversy about the facts; these were all admitted. And because he knew this, his offence was the greater; for when he was convinced the facts were undisputed, he placed the whole case beyond the reach of hope, by pronouncing the law, before the jury was sworn. That he did know there was no dispute about the facts is proved in the 12th page of his answer, in which he says, "it was not suggested or *understood* that any new evidence was to be offered," and one of his counsel, the attorney general of Maryland, has said, that the judge had the use of Mr. Rawle's and Mr. Peter's notes of the former trial. From these notes, and from his conversation with these gentlemen, he became perfectly acquainted with the facts in the case. Knowing them to be undisputed, he resolved to seal the doom of the wretched prisoner, by publicly pronouncing his opinion before the trial commenced, in the presence of the jury, thereby attempting to prejudice their minds against any thing which might afterwards be urged in his favor.

The learned counsel for the judge having denied that the opinion was publicly delivered, they endeavor to give a colouring to the transaction, by alleging that it was delivered to Mr. Lewis only, as counsel for the prisoner; and this they, as well as their client pretend was intended for the benefit of Fries, in order that himself and his friends might see the necessity of procuring new testimony. This is the excuse offered by the judge in the 12th page of his answer, and it has been reiterated over and over again, by his counsel at the bar. Let us examine it, and determine for ourselves, whether this could be the motive. In the 10th page of the answer, it is stated, that the indictment against Fries was found

Digitized by Google

by the grand jury, on the 16th day of April, 1800, and "*that his trial was appointed to be had on the 22d day of the same month.*" Thus six days intervened between that on which the indictment was found, and that fixed for the trial, agreeably to the judge's own statement. The court was in session every day, and we may fairly presume that Mr. Lewis and Mr. Dallas, both being extensively engaged in business, attended constantly. If this great favor to Fries was intended, and there was a wish to apprize his counsel of the opinion of the court, in order that new testimony might be procured, one would naturally suppose, that some *opportunity* of conversing with the counsel *privately*, might have been embraced, and this special favor might have been thus conferred. But what is the fact? This information was never given until the day arrived, which was fixed for the trial, nor until after the prisoner was brought to the bar. Was this a time to procure new testimony? Did it afford any opportunity to send fifty or sixty miles into Northampton county, for the purpose of bringing other witnesses? Could this possibly be the motive which actuated the judge? Surely not—or why defer it to the very latest moment preceding the trial? Why deliver the opinion *publicly*, not only in the hearing of the counsel, but of the jury, and every other person present? Sir, I am persuaded the court will agree with me, that the reason assigned is, as it has been stated in the replication, an unworthy evasion.

The counsel (Mr. Hopkinson) who first addressed the court in favor of the accused, viewed this part of the subject in a different light. He very ingeniously offered another excuse. He considered it a great favor done to the prisoner, not because it was intended to give him an opportunity of introducing new testimony, but he says the judge declared the opinion of the court, for the purpose of drawing the attention of the counsel to those particular points, which it would be necessary for them to argue, in order that the error of the court might be corrected, if it was an error. This he called a very great advantage, and supposed that counsel al-

Digitized by Google

ways ought to be thankful for it. Such a course may sometimes give advantages, but in my judgment the disadvantages are generally much greater. On that occasion, however, it gave no advantage, and could not be intended to give any. The court knew precisely what ground the counsel meant to take. One of them had been present at Fries's former trial, and we are told that judge Chase had the benefit of his notes, as well as of those of the district attorney. He knew therefore perfectly well, that the points intended to be relied on, were precisely those which he had peremptorily decided against them. He knew that there could be no necessity for drawing the attention of counsel to them, for they had been relied on at the former trial. This therefore could not be the motive, and is, like the other, nothing more than an evasion.

Let us see too, how this reason or excuse will correspond with the principal ground of defence set up by the judge, and very much dwelt on by his advocates. In the 12th and 13th pages of the answer, the judge states that there were more than one hundred civil causes then depending in the court, and he conceived that an early communication of the court's opinion would tend to the saving of time. Now permit me to ask if any time whatever could be saved, if as the gentleman supposes it was the intention of the court to draw the minds of the counsel to the particular points stated in the judge's opinion? For it must be conceded, that if the counsel were to attempt to convince the court that their opinion was erroneous, no time whatever could be saved, as the very attempt itself would tend to the consumption of that time which the judge deemed so precious.

I have therefore proved that the opinion was publicly delivered; that it was applied by the judge in direct terms to the case of Fries, in the presence and hearing of the jury, who were to decide upon his life and death, thus tending to prejudice their minds against him; and I flatter myself I have also proved the entire futility of those excuses which have been set up for him, as well by himself as by his counsel.

Digitized by Google

Much has been said with a view to convince the court that the opinion thus delivered was a correct one, and it has therefore been argued that his conduct was perfectly justifiable. For my own part I consider it totally immaterial in the present case, whether the doctrine of treason as laid down by the judge was correct or not; for even if it were correct, the time and manner of delivering it, and the persons to whom it was delivered, form the substance of the charge against him. It is a misdemeanor, a high misdemeanor in a judge, wantonly to give an opinion upon any case which is to come before him, previously to the swearing of the jury; and the offence is made much greater by the opinion being publicly declared in the presence of the jury, who ought to come to the trial of every cause with minds wholly free from prepossession against either party.

Although the judge has said in his answer, that no gentleman of established reputation for legal knowledge would deliberately give a contrary opinion, yet I have not the slightest apprehension that any little reputation which I may possess, can be in any manner affected by my expressing, as I now do, my entire conviction that the doctrine of treason, as laid down in Fries's case, is wholly repugnant to the spirit and meaning of the constitution. It is not my intention at this time to enter into an argument to prove this, for I have before said, that I consider it quite immaterial in the present discussion; but I will offer some few observations, to demonstrate to the Senate that there was nothing very unreasonable in the wish expressed by Mr. Lewis and Mr. Dallas, to shew that the constitution was susceptible of another construction.

The constitution declares, that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." John Fries was indicted for *levying war* against the United States, and the facts I believe were, that he, with some others, did, in a forcible manner, rescue some prisoners from the marshal of Pennsylvania. This was called a resistance to a law of the Uni-

Digitized by Google

ted States, and by construction, was determined at the former trial to be the treason of levying war. It was in opposition to this construction of the constitution that Mr. Lewis and Mr. Dallas wished to be heard. It was certainly not a very extravagant wish on their part, for it ought to be recollected that we are a young nation, and it is deeply interesting to us all, that the constitution of the United States should not receive a construction unwarranted by its letter. After the decisions had taken place in the courts, upon the western insurrection, (I mean in the cases of Vigol and Mitchel) Congress had passed an act declaring that to resist a law of the United States, should be deemed a high misdemeanor, punishable by fine and imprisonment; and they had before provided by the act of 1789, that to rescue prisoners from the custody of the marshal, should also be punishable by fine and imprisonment. Mr. Lewis and Mr. Dallas were desirous of shewing, that Fries's case came within the provisions of these laws, and that his offence was not of such a nature as to forfeit his life. They also wished to have an opportunity of proving, that the terms *levying war* ought not to receive the same construction here as in England. To convince the Senate that they were not singular in their ideas, and that the construction given by the court has not been unanimously assented to, I shall take the liberty of referring to an author of merited reputation, to whom I believe our adversaries will not refuse their respect. Judge Tucker of Virginia, in his valuable edition of Blackstone's Commentaries, in the appendix to the 4th volume, under the title *Treason*, after reciting that part of the constitution relating to the subject, observes,

"It is probable that no part of the constitution of the U. S. was supposed to be less susceptible of various interpretations than that which defines and limits the offence of treason against the U. S. the text is short, and until comments upon it appeared, might have been deemed explicit; it is as follows:

"*Treason* against the *U.* . shall consist ONLY in *levying war* against THEM, or in adhering to THEIR *enemies* giving them *aid* and *comfort* *."

* Article 3.

Digitized by Google

"From this declaration contained in the conſtitution of the U. S. the ſupreme law of the land, and the fountain both of the authority of the government and of the crime againſt it, a plain man might draw concluſions very different from the artificial reaſoning and ſubtle refinement of technical men: and ſeeing that *that* inſtrument is to be regarded as the act of the people of the U. S. both collectively and individually, it might ſeem reaſonable that the interpretation of nine hundred and ninety-nine plain men, who were parties to it, ought to ſerve as a guide to the thouſandth man, who may happen to be called upon to expound it. But as technical men are not very apt to reſpect the opinions of ſuch as have not been educated in the ſame habits with themſelves, the probability is, that the opinions of one man in a thouſand or rather in a hundred thouſand, will overbalance that of the reſt of the community, unleſs the latter ſhould deem it an object worthy of their attention to expreſs their opinion, in ſome way that may be regarded as obligatory upon the few who diſſent from them.

"As new fangled and artificial treaſons have been the great engines by which violent factions in free ſtates have uſually wreaked their alternate malignity on each other, the convention have, with great judgment, oppoſed a barrier to this peculiar danger, by inſerting a conſtitutional definition of the crime *."

"Judge Wilſon, in the firſt charge which he delivered in the federal circuit court of Pennſylvania, expreſſed himſelf thus on the ſubject. 'It well deſerves to be remarked, that with regard to treaſon a *new* and *great* improvement has been introduced into the government of the U. S.: Under that government the citizens have not only a legal but a conſtitutional *ſecurity* againſt the *extenſion* of that crime, or the imputation of treaſon. Treaſons capricious, arbitrary and *conſtructive* have often been the moſt tremendous engines of *deſpotic* or *legiſlative* tyranny †.'

"Judge Iredell on a ſimilar occaſion in South-Carolina, obſerves—Treaſons conſiſt in *two* articles *only*; levying war againſt the U. S. or adhering to their enemies, giving them aid and comfort. The *plain definition* of this crime was juſtly deemed of ſuch moment to the liberties of the people, that it was made a part of the conſtitution itſelf. None can ſo highly prize the importance of this proviſion as thoſe who are beſt acquainted with the *abuſes* which have been practiſed in other countries in *proſecutions* for this offence. *No man of humanity can read them without the higheſt indignation;* nor in particular, can they be read by any citizen

* 2 Federaliſt, No 43.

† Carey's American Muſeum, Volume 7, pa. 49.

Digitized by Google

of America, without emotions of gratitude for the much happier situation of his own country *.

"Such probably were the opinions of the citizens of America in general, when they adopted the conſtitution; but *technical* men have ſince made ſome important inferences and deductions from the use of ſome words in that definition, which are to be found in the ſtatute of treaſons in England †, from whence they conclude, that the deciſions made upon that act in England, during a period of near five hundred years, however contradictory or inconſiſtent they may be with the text or with each other, have been *adopted* alſo by the conſtitution, 'as a *direction* whereby the *courts* are to *underſtand* the *application* of that act ‡.' And it has even been advanced on a very important occaſion, that what in England is called *conſtructive* levying of war, in this country muſt be called *direct* levying of war ||.

"It is on the authority of a paſſage in the Mirror, that ſir Edward Coke lays it down §, that levying war againſt the king was treaſon by the common law. We find then that the common law ſenſe of this obſcure phraſe, as ſir Matthew Hale calls it **, was *the bringing in or raiſing an army*. And in this ſenſe it is probable that every man in America [with the exception perhaps of half a dozen lawyers] underſtood the term *levying* war, when the conſtitution was adopted: and in this ſenſe it ſeems to be ſtill underſtood by ſome gentlemen, whoſe profeſſional talents are both an honor and an ornament to their country ††."

Such we find are the opinions of judge Tucker, an able and upright lawyer, who thinks that the conſtitution ought to be conſtrued agreeably to the plain import

* Idem, Vol. XII, part 2, pa. 36.

† 25, Edw. III.

‡ Trial of Fries, p. 123 and 168.

|| The paſſage ſtands thus. "If you expunge what is a direct levying of war, there can no ſuch thing as treaſon be found; either the law is wrong, or the arguments uſed on the other ſide. Gentlemen, the law is eſtabliſhed, but the arguments vaniſh like vapour before the morning ſun; what then in England is called *conſtructive* levying of war, in this country muſt be called *direct* levying of war." *Trial of Fries*, p. 161. I ſhould incline to ſuſpect the reporter of ſome miſtake in this paſſage, but it would ſeem that it had been ſubmitted to the inſpection of the counſel to whom it is aſcribed.

§ 3 Inſt. pa. 9.

** 1 Hale's Hiſt. P. C. 148.

†† Trial of Fries, 92, 99, 139, &c.

Digitized by Google

of its language, and ought not to be involved in technical abstruseness. In that series of publications entitled the Federalist, written at the commencement of the present government, by some of the ablest men in this nation, for the purpose of defending the constitution, it is matter of boast, that treason was fully defined, and not left to wild and arbitrary construction. But what avails the definition, if the constructive treasons of England are to be drawn in as precedents for us?

Sir Matthew Hale, than whom an abler, or a better judge never graced the English bench, tells us that the words *levying war*, were formerly construed to mean "the raising an armed force or bringing in an army," and surely such to a man of plain sound sense, would appear to be their true meaning under our constitution. He says that the first instance which he finds of constructive treasons, was in the reign of Henry the eighth, when certain persons who had combined for the purpose of raising servant's wages, were adjudged to be guilty of levying war; and the next was in the reign of Elizabeth. Thus, from these two decisions constructive treasons became fashionable, and scarcely any thing could be done, but arbitrary judges were found to construe it into treason. All was either levying war or conspiring against the life of the king, and executions and attainders innumerable followed. Every new case formed a new precedent, and strengthened the old ones. In the reign of Charles the second, a number of apprentices were indicted for the treason of levying war, and this levying of war consisted in their having pulled down a certain description of houses. Hale was then one of the judges, and although these constructive treasons had been fashionable for an hundred and fifty years, he doubted. His brethren however over-ruled him, and these decisions in the worst of times have governed England since, and are now to be introduced here to govern us. Hale's reasons for differing with the other judges are stated in his pleas of the crown, and more at large by Keelyng in his reports. Although he lived in bad times he wished to make them better, by

Digitized by Google

resisting that torrent of oppression which threatened to overwhelm the subject. I am sorry to add that since the revolution of 1688, the courts of England have thought themselves bound by those prior determinations, and decide accordingly. But we are not bound by them, and I do trust that they will be rejected. It is impossible to say to what lengths we are to be carried, but I cannot help feeling some alarm when I find it declared by Mr. Rawle, the then district attorney, upon Fries's trial, that "what in England is called *constructive* levying of war, must in this country be called *direct* levying of war." (See Fries's trial, p. 161.)

I before stated that I did not mean to enter into an argument against the correctness of the court's opinion; nor have I done so, but have offered these remarks to shew that it was not unreasonable in Mr. Lewis and Mr. Dallas to wish that another construction of the constitution might be received. The counsel for judge Chase seem to think it monstrous that they should have wished to argue the point after the law had been settled by three former decisions, which had taken place in the course of four years. Let it be remembered that sir Matthew Hale doubted, after the lapse of one hundred and fifty years from the first of these constructive treasons, and after, for aught I know, one hundred and fifty cases had been decided. Mr. President, far from thinking their conduct on that occasion extraordinary, I, as a free man of America, most cheerfully accord them my thanks for the stand they made; and I do hope and trust, that if ever a similar case should occur, in which the same doctrine of constructive treasons shall be urged to a jury, men like Mr. Lewis and Mr. Dallas will be found, men of exalted talents and extensive learning, who will be bold enough to assert the rights of the citizen, and save the constitution of their country from destruction.

Another justification of a peculiar nature is set up in defence of judge Chase, by a statement made in Keelyng's Reports. It is there said that "after the *happy* restoration of King Charles the 2nd, Sir Or-

Digitized by Google

lando Bridgman, chief justice of the king's bench," and some six or eight others, judges, prosecutors and king's solicitors, assembled for the purpose of determining in what manner the *regicides* should be tried, and they settled many points which it was supposed would occur upon the trials. This, sir, is an unfortunate period to refer to for justification of the conduct of judges in our day. Never was there a moment of such fawning servility; never was there a period of such unbounded licentiousness. The hope of reward or the fear of punishment brought almost every man crouching at the foot stool of the throne, and all united in singing Hosannas to the king, and crying aloud for the crucifixion of the miserable regicides. This conspiracy (which has been quoted) against the wretched victims whose sacrifice was resolved on, was headed by that most servile of all servile tools, sir Orlando Bridgman. His character and those of his brother judges who conspired with him, may be collected from the charge which he gave to the grand jury on that occasion. It will be found in the 4th volume of state trials, and it will there be seen how flamingly he talked of the *divine right of kings*, who he called *God's vicegerents* on earth; their persons he said were too *sacred* for their conduct to be enquired into: *they held their power from God, and were accountable to him alone; it was treason in their subjects to enquire into the propriety of what they did*, with much more of the same cast. These are the times, these the men, and this is the conduct now introduced for the justification of judge Chase. If they will afford him a justification he is welcome to it for me. They were woeful times indeed—one would have thought the parliament which the king found in session upon his return, was submissive enough; but he was not satisfied, and finding the whole nation ready to bow at his nod, he ordered a new one elected, and they proved so compliant to all his wishes, that he continued them for eighteen years. This sufficiently proves the servile spirit of those whom the king thought proper to employ on this noted occasion, and it is not much to Mr. Keelyng's honor that he was one of them.

Digitized by Google

The points which they did settle were of an extraordinary nature, and one of them was read a few days since by one of the counsel (Mr. Key) to shew that Basset was a good juror in Callender's trial.

If however this famous precedent had been made in the best of times, it does not apply to the present case. For these judges bad as they were, yet had modesty enough to keep their opinions to themselves, till after the trials had commenced, and did not deliver them until the occasions arose which called for them. Judge Chase, we have fully proved, delivered his opinion before hand, publicly, and in the hearing of the jury, so that the authority of Mr. Justice Keelyng and sir Orlando Bridgman does not justify him. He outstripped even them.

Having thus, as I conceive, fully established the first specification contained in this article, and having answered the only colourable excuses advanced in favor of the judge, I shall proceed to the second specification. This is a charge against him for "restricting Fries's counsel from recurring to such English authorities as they believed apposite, and from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client."

The restriction is in some sort admitted, for we are told, that the counsel on both sides were restricted, and Mr. Rawle's testimony is relied on to support this allegation. If the counsel on both sides were restricted, it was a restriction of a most curious nature, as far as it related to the district attorney, Mr. Rawle; for the only restriction imposed on him was that he should not defend Fries, which his duty would not permit, nor perhaps his inclination. It is in vain therefore to talk about both being restricted, when the opinion of the court was all on one side; and it was well ascertained by the course taken by Mr. Rawle on the former trial, that he had no disposition to controvert the doctrine of treason, as laid down by the court.

That the counsel of Fries were prohibited from recurring to such English authorities, as they believed

Digitized by Google

apposite, and from citing certain statutes of the United States, I consider entirely proved by the testimony of Mr. Lewis and Mr. Dallas. Without meaning to impeach Mr. Rawle's veracity, or that of any other person, I contend that Mr. Lewis and Mr. Dallas are entitled to more credit than he is, because he took no notes of the first day's proceedings, and is contradicted in many very material points by the admissions of the judge himself. Mr. Lewis and Mr. Dallas gave their testimony a year ago; they have confirmed it at the bar now, and are supported by the judge in his answer, as far as he thought it prudent to go. That Mr. Rawle is contradicted, and Mr. Lewis and Mr. Dallas supported by the judge in many material points, I will proceed to shew.

Mr. Rawle says that the judge, when he handed the written opinion down, declared the counsel on each side were to have a copy, and another copy was to be *taken out by the jury*. Mr. Lewis states this materially different, for he says the judge declared that a copy *was to be delivered to the jury as soon as the case on the part of the prosecution was opened or gone through*. Here these gentlemen differ. Let us see what the judge says. In the 15th page of the answer he says he stated that "three copies were to be made out, one to be delivered to the attorney of the district, one to the counsel of the prisoner, and *one to the petit jury, after they should have been impannelled and heard the indictment read to them by the clerk, and after the district attorney should have stated to them the law on the overt acts in the indictment, as it appeared to him.*" Thus Mr. Lewis and Mr. Dallas are supported, and Mr. Rawle pointedly contradicted.

Again, Lewis and Dallas state a long conversation, not of a very mild nature on the part of Lewis, which took place between him and the judge on the first day, in which the contents of the written paper were very fully disclosed by the judge. Mr. Rawle recollects nothing of this, but expressly says the court when they handed down the papers, only stated that they had thought proper to draw up their sentiments of the law,

Digitized by Google

likely to arise in the cases of treason, in order that they might be perfectly understood, which would tend to save time. He does not recollect that any thing more was publicly said about it that day. In the 14th and 15th pages of the answer, the judge states a long conversation that took place between himself, Mr. Lewis and Mr. Dallas, and in this supports the testimony of these two gentlemen, while he contradicts that of Mr. Rawle.

Another fact in which Mr. Rawle differs from Mr. Lewis and Mr. Dallas is as to John Fries being in court that day. Mr. Rawle does not recollect that he was; Mr. Lewis swears that if he was not in the prisoner's box at the moment the paper was handed down, he was placed there a few minutes after, and judge Chase in the 14th page of his answer expressly states, that Fries was placed in the prisoner's box, before any of the events occurred which form the subject of enquiry to day.

When Mr. Rawle's memory is so defective as to these three important facts, in the statement of which Mr. Lewis and Mr. Dallas are so strongly supported by the judge himself, I ask if their testimony ought not to have infinitely more weight than his. In noticing these contradictions, I have not relied on my own notes of the evidence, or on my own memory, but have referred to the three printed affidavits of Mr. Rawle, Mr. Lewis and Mr. Dallas, made out by themselves last year, and corroborated by the oral testimony which each has delivered in at the bar.

I must therefore be permitted to insist that Fries's counsel were prohibited from recurring to English authorities, and from citing certain statutes of the United States. It is fully proved by Mr. Lewis, and corroborated by Mr. Dallas. The latter was not in court when the conversation took place; but coming in immediately after, he was informed of it by Mr. Lewis, and then stated to the court what Mr. Lewis had told him. The court did not deny it, and certainly it is to be presumed, if Mr. Lewis had made an erroneous statement of facts to Mr. Dallas, and they had been repeated by

Digitized by Google

Mr. Dallas, the court would have contradicted them. This was not done, and both these gentlemen now swear that they were prohibited.

Let us enquire why there was a wish on the part of the prisoner's counsel to recur to English authorities. On the former trial of Fries, the court had grounded their opinion upon the construction which had been given in England, to the words *levying war*. The district attorney and his assistant, had relied on the same authorities. The counsel for the prisoner were desirous of shewing, as they themselves have stated, that although these interpretative treasons had been admitted in England since the revolution of 1688, yet that they were founded on precedents made during arbitrary reigns, by which the courts in England afterwards conceived themselves bound. I have already shewn to you from Hale's pleas of the crown, what was held to be the plain and simple meaning of the words *levying war*, antecedent to the reign of Henry VIII. when these interpretative treasons were first introduced, and it cannot be doubted that the object of Fries's counsel was to convince the jury that the constitution of the United States ought to be construed agreeably to the plain import of its own language, without being subjected to those wild and arbitrary constructions, which had originated in the worst of times for the worst of purposes. The reason why they wished to cite the statutes of the United States I have before mentioned to be, to shew that the offences charged against Fries were of such a nature as to subject him to fine and imprisonment only, and not to a forfeiture of his life.

But, sir, a doctrine as novel to me as any I have lately heard, has been advanced on this occasion. A distinction is attempted to be taken between the *right* of the jury to decide the law as wellas the fact, and their *power* to do so. I have always thought that in criminal cases the jury had both the right and the power. This is the first time I have ever heard it denied, and I trust it will be the last. This right is one of the most valuable features in the trial by jury, and if a jury should be so servile on a question of life and death, to surrender

Digitized by Google

their own opinions to those of the court, they would be unworthy of the name of freemen. Although the *right* is denied, the *power* is admitted. I contend therefore that the power includes the right. For if they have been suffered to exercise this power for more than an hundred years, without being restricted by law, it surely cannot be questioned that they have acquired the right. The right to decide both the law and the fact is admitted in England, it has been acknowledged there for more than two hundred years, although I believe an instance or two may be found in the time of the noted *Jeffries*, when juries were attainted for daring to exercise this right. The power to attaint however has been long since abolished, and no instance can be produced since the revolution of 1688, in which a verdict of acquittal has been ever set aside, because the jury have ventured to decide against the opinion of the court. The judge in his answer admits the *right* of the jury to decide both the law and the fact, and if he had not, but had taken the ground contended for by his counsel, I should have considered it a strong evidence of his guilt under the third specification.

The third and last specification charges the judge with "debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law as well as the question of fact, involved in the verdict which they were required to give."

We do not contend that the counsel were debarred from addressing the jury by the interference of sheriffs and constables, for it is not necessary to prove the actual exercise of force. But we do allege, and we have proved it by Mr. Lewis and Mr. Dallas, that the judge declared on the first day, that they must address the court and not the jury. I have before shewn that these gentlemen are entitled to more credit than either Mr. Rawle, Mr. Meredith, or Mr. Tilghman, for their testimony is better supported than that of the others, by

Digitized by Google

the answer of the judge. It ought to be remembered too that they were more particularly interested in the transaction than the rest of the gentlemen, and therefore the probability is, that the facts were more strongly impressed on their minds.

An attempt however is made to shelter the judge from this part of the accusation, by saying that he declared counsel would be heard although this opinion was given. Sir, this is another evasion. The opinion itself carries with it internal, uncontrovertible evidence of the determination of the court that the counsel should not address the jury. What is the principal ground of defence, what is the leading reason urged for giving this extraordinary opinion before the jury was sworn? It was, as the judge says, and as his counsel have argued, to save time. They state that there were more than one hundred civil causes then pending, that the delay of business in Pennsylvania had been long a subject of complaint, and the judge was anxious to make Fries's trial a short one, in order that they might have time to proceed with the other business. Now suffer me to enquire how time was to be saved, how the trial of Fries was to be shortened, if his counsel were to be allowed to address the jury on the law which the court had already decided? Was not the opinion of the court given for the express purpose of preventing them from addressing the jury, or if not for this, let me ask for what purpose it was given? Was it to prejudice the minds of the jury, to close their ears and their understandings against any arguments which might be offered them? Gentlemen say no. Was it to save time? This was impossible, because the time was still to be occupied by the counsel being permitted to address the jury. Why then let me again ask was the opinion given? The answer is ready. It was intended to produce both these effects. The minds of the jury were to be pre-occupied by the imposing authority of the court, and in this manner it was expected to deter the counsel from addressing them on the law. Nothing therefore can be clearer, than that the counsel were prevented from addressing the jury, and that the judge "*endea-*

Digitized by Google

vored (in the language of the article) to wrest from the jury their right to hear argument, and determine upon the question of law." But it is said that the right of the jury to decide the law does not give them a dispensing power over the law, and that therefore they are bound by the opinion of the court. Nor does the right of the *court* to decide the law give *them* a dispensing power over the law. The jury have a right to decide the law and are not bound by the opinion of the court. In order to enable them to decide correctly they have a right to hear argument, and any attempt to prevent this, is an attempt to wrest from them their right to decide the law, and is a high misdemeanor.

We are told however that if any thing wrong was done on the first day, ample atonement was made on the second. It is true that the judge exhibited some appearance of a wish that the counsel would proceed on the second day, but Mr. Lewis well remarked, that although the papers were withdrawn, the impression which had been made on the minds of the jurors could not be removed. What sort of an atonement too was this? It carried insult with it, and the language in which it was made, had a still greater tendency to strengthen the impression made the day before. The counsel were publicly informed they might proceed as they pleased, *but it must be at the hazard of their characters*, and under the direction of the court. Is there a man of reputation on earth, possessed of the smallest spark of feeling, that would consent to disgrace himself, by addressing a jury under such circumstances? This alone, if nothing else had taken place, was sufficient to drive them from the defence of their client; and if they thought that their abandoning him might eventually save his life, they were fully justified in doing so.

The learned advocates for the judge have talked highly of the independence of the judiciary, and have asked what inducements any judge could have to act as we have charged judge Chase with acting. Are there then no inducements for a judge to swerve from his duty? Has he no feelings to gratify, and is it im-

Digitized by Google

possible for him to become a partizan? Does his character as a judge divest him of his ambition as a man? Is he so incorruptible that temptation cannot assail him? Look through the annals of other nations—Read the history of England for the last forty years. Judicial independence has been for a long time as well secured there as here; and yet how many instances shall we find in that country, of prosecutions in which the feelings of the ministry had been engaged, and in which their influence over the judges has been too flagrant to be mistaken? In Ireland, miserable Ireland, a still more gloomy prospect presents itself. They too have boasted an independent judiciary: but an over-ruling influence has crumbled it into ruins. The demon of destruction has entered their courts of justice, and spread desolation over the land. Execution has followed execution, until the oppressed, degraded and insulted nation has been made to tremble through every nerve, and to bleed at every pore. Let us then be warned by the fate of Ireland. In state prosecutions her judges look to the castle—although they cannot be put down, they may be elevated. Some of our judges have been elevated to places of high political importance; splendid embassies have been given to them. I will not say that they were given or accepted with improper views; but they have been given, and surely they hold out inducement enough for a judge to bend to the ruling party. It is our duty to prevent party spirit from entering into our courts of justice. Let us nip the evil in the bud, or it may grow to an enormous tree, bearing destruction upon every branch. You have now an opportunity of doing it, and I trust you will not suffer it to escape you. I therefore hope that you will not only remove judge Chase from the high office which he now fills, but that by your judgment you will forever hereafter disqualify him from holding any office of profit or trust under the government of the United States.

I have thus, Mr. President, gone through the first article of the impeachment, and will not encroach upon the others; their elucidation I shall leave to my friends,

Digitized by Google

who will follow me. A sense of public duty alone led to the present prosecution, and having discharged this, we shall have nothing to reproach ourselves with, let your decision be what it may.

Mr. RODNEY.

Mr. PRESIDENT,

AND GENTLEMEN OF THE SENATE,

THE present trial exhibits a spectacle truly solemn and impressive. A man who holds one of the highest judicial offices under the government, who, from the period of the revolution, has filled many of the most important public situations, and whose hairs have been bleached in the service of his country, is charged before this dignified tribunal, by the Representatives of the American people, with the commission of acts in violation of his duty as a judge, and of the laws and constitution of the land.

On one hand the character of an aged and respectable individual, which may be dearer to him than the small remnant of his life, is involved in your decision; on the other the most precious rights of free citizens, and the dearest interests of society.

The mind which could contemplate, unmoved, such a scene, cannot feel for the welfare of the people, or the honor of the nation; and must be equally insensible to the finer sympathies of life and the practice of its charities and affections.

The public anxiety manifested by this deeply interesting trial must be evident to all; a trial of the first importance because of the first impression; a trial not confined to a single act in the conduct of the accused, but embracing a variety of transactions at different periods of his life; a trial which departs from the ordinary mode of decision, whose novelty and magnitude have excited so much interest and attention, that it seems to have superseded for the moment, not only eve-

Digitized by Google

ry other grave object or pursuit, but every other fashionable amusement or dissipation.

The task of prosecuting is always very unpleasant, and to me extremely painful: but my rule has ever been not to suffer private considerations or personal feelings to stand in the way of a firm and independent discharge of public duty.

To this exalted tribunal I look with confidence for a display of that dignified impartiality, which will do credit to their elevated situation, and reflect honor on their country. You will raise yourselves, I am convinced, above the common level of human prejudices, personal or political, and will suffer no considerations but those which are perfectly correct, to be blended with your enquiries or mingled with your decisions.

Party, it is true, is a spirit of so subtle a nature, as to diffuse itself almost imperceptibly over the human mind: It frequently pervades the system without being felt, and sometimes warps the judgment when least suspected. Against the influence of this spirit I need scarcely caution the judges whom I have the honor to address. It cannot approach within the pale of this court or enter their hallowed walls.

I have marked, Mr. President, in the questions which you have so correctly put to the witnesses in the course of their examination, that singleness of eye, which looks to the discovery of truth alone, without reference to the party whose case it may affect; whilst your conduct in maintaining that order and decorum suitable to the solemnity of the occasion, has exhibited an example worthy of imitation.

I have observed with heartfelt pleasure and honest pride, the unwearied and impartial attention paid by the members of this court during the progress of this momentous cause. To my mind it presages a decision worthy of themselves and serviceable to their country, and is a sure pledge that their determination will be honest, upright and independent.

If after a fair and full enquiry into the facts, illustrated by the arguments for and against the accused, and a careful examination of the law, commented on by those

Digitized by Google

whose duty it is to support the impeachment, and those who are opposed to it, the Senate shall be of opinion that the charges have not been substantiated, and pronounce a verdict of acquittal, believe me, sir, I as a citizen, faithful, obedient and affectionate to the laws of my country, shall most cheerfully acquiesce in the decision. But I do confidently trust that it will not take place, on the principles or the precedent established in the case of Warren Hastings, the governor of Bengal, that plunderer of India, that destroyer of the people of Asia, that devastator of the East, whose crimes were without number, and whose enormities exceeded calculation. What fields have been dyed, what streams have been tinged with the innocent blood of victims sacrificed on the altar of his avarice or his ambition! An obligation however solemn, a treaty however sacred, interposed but a weak and feeble barrier to the views of his personal or political aggrandizement. Even a *Zenana*, the sacred retreat of women, holy and consecrated to the fairest work of the creation, by the religious customs of that country, has been violated whenever the silver and the gold, the jewels and the diamonds were sufficient objects to attract his attention or gratify his rapacity.

Before I proceed to the discussion of those facts and principles more immediately connected with the subject now under investigation, permit me to advert for a few moments to the manner in which the defence has been conducted. I shall also claim your indulgence for a small portion of time whilst I reply (I fear in a desultory way) to some remarks, and notice some matter which has been blended with this case, no doubt with the view of giving it a complexion favorable to the defence, but which I humbly conceive to be rather foreign and extraneous.

The fascinating voice of eloquence and the deluding tongue of ingenuity, tho' excited with great address, will produce no other effect before this tribunal, than to excite that degree of pleasure which we all feel on the display of professional talents. It shall be my duty, (because I believe it to be not only the duty but the in-

Digitized by Google

terest of every advocate to have a decision on argument and argument alone) to avoid every thing like declamation, and to address you in the sober narrative of fact, and the temperate language of reason.

The counsel for the aged defendant have explored every avenue to the human heart to awaken your sensibilities, and have appealed to your passions to enlist them under their banners; at one time attempting to excite your sympathies in favor of their unfortunate client, and at another endeavouring to kindle your resentments against the prosecution. They may perhaps have been occasionally in the habit of addressing those with whose feelings they could play as the winds do with the waves; and animated by the trophies of former victories, they have recurred to the same means of conquest which have before crowned their exertions with success. The judges of this court are no doubt alive to the generous feelings of sympathy and compassion, when an object presents itself calculated to excite them. But even when under the influence of this mysterious power, they will always remember that humanity is the second virtue of courts, justice the first.

You have been more than once solemnly reminded, that the decision which you may give will be re-examined by those who succeed you, and that posterity will re-judge the judgment which you may pass at this time. To that impartial tribunal let the appeal be made. I fear that when future annals, faithful to the cause of truth and justice, shall record the patriotism and the virtues of my honorable friend who gave birth to this impeachment, the weeping voice of history will be heard to deplore the oppressive acts and criminal excesses of the judge, who, with a boldness and violence unparallelled in this country, seems to have trampled under foot, as if conscious of impunity, the established principles of law, and the rules of decency and decorum.

The defendant himself in his answer, looking beyond the transient scenes of this world, has crossed the stream of time, and carried us, in idea, on the ocean of eternity, to the footstool of that throne which is

Digitized by Google

washed by its waves. It is true e'er long we must all embark on that voyage from which no mariner returns; and be borne with myriads on the same swell to the judgment seat, when our fates will be decided for eternity. On that awful day, I trust we shall appear with the hopes and the consolations which beam upon the soul from the everlasting light of divine revelation: That whatever frail passages may chequer the volumes of our lives, tho' the conduct of the defendant towards the unfortunate, unprotected and persecuted Fries may appear *scored matters* in the book which records his deeds, infinite mercy will obscure them from the eyes of infinite purity, and a sincere repentance blot them out forever.

It struck me with some degree of surprize, when I heard the language of complaint from my learned friend, (Mr. Hopkinson. who summed up the evidence on the first article in favor of the accused, because this impeachment was not instituted sooner. He seemed to ask with an air of triumph, when did the transactions take place upon which the present prosecution is grounded? I answer with confidence they took place at different and distant periods. Some of them as far back as the year 1800, and others but yesterday, as it were. The whole linked together by the spirit of persecution, and forming a chain of offences against the violated laws of the country and the insulted justice of the land, which cannot be broken by testimony or weakened by argument. And yet because the guardians of the people's rights and liberties have submitted to bear with patience the oppressive acts of the defendant, until they could endure them no longer; because considering him cloathed beneath the ermine of justice with the common infirmities of man, they have been slow to anger, and have waited for the season of repentance and reformation; the very lenience and forbearance, which they have manifested by their conduct, to the world, are forsooth used as an argument against the present impeachment. With what justice or propriety this court will determine. Had they, imitating the example of the accused, employed their time in hunting for criminality, and the instant they suspected an of-

Digitized by Google

fence, a sentence of condemnation succeeded, quick as the thunderbolt pursues the flash, they would have received, I presume, credit for the zeal and promptness which they displayed in the task of prosecution. Let it be remarked that justice is of slow pace, but of certain step, and that the sufferings and the tears of the innocent, however deeply buried, will rise up in judgment to confound the guilty.

The House of Representatives, so far from deserving blame, in my humble opinion, merit commendation for the reluctance with which they proceeded to accusation, and for the care, caution and dignity which have marked their steps. I have frequently heard an unbecoming zeal reprobated in a prosecutor; but never before did I hear from the lips of a counsel for an offender, a complaint of delay and remissness in charging his client with guilt. What a striking contrast does their conduct furnish, compared with that of the defendant! They betrayed no thirst for prosecution, but an unwillingness to accuse; no eager appetite for conviction, but an anxious desire that impartial justice should take place between the public and an individual, whom irresistible evidence had compelled them to present before the highest judicial authority of the nation. Not, it is true, for the murder of depotic princes whose will was the law, and whose laws perhaps were as sanguinary as those of Draco; nor for the plunder of empires, swayed by an iron sceptre as oppressive as the dominion of Hastings. Far other crimes are laid to his charge. The defendant, a citizen of this free land, sworn to support our mild constitution and our equal laws, and bound by his oath of office to administer justice impartially, having a perfect knowledge of his duty, (for of ignorance the whole world will acquit him) stands charged with plundering, in the holy habit of a judge, a jury of his country of their most sacred rights, and injured and insulted freemen of their constitutional privileges.

He was indeed providentially prevented from imbruing his hands in the blood of poor Fries, but he stands accused of shedding, with unfeeling severity, the life blood of the constitution itself.

Digitized by Google

Such are the crimes for which he is arraigned at your bar, and which one of the gentlemen has been pleased to term petty offences. In the dark catalogue of criminal enormities, perhaps few are to be found of a deeper dye. If I were an advocate of the doctrines of constructive and cumulative treasons, of which the learned judge appears to have been a great admirer and a zealous supporter, I would say that he himself was guilty of judicial treason against the constitution of the country, and the majesty of the people.

The independence of the judiciary, the political tocsin of the day, and *the alarm bell of the night*, has been rung through every change in our ears. They have played upon this cord until its vibrations produce no effect. The sound is rather calculated to stun us into an insensibility against real attacks, for the poor hobby has been literally rode to death. To the rational independence of the judiciary I am, and ever have been a firm and uniform friend. But I am no advocate for the inviolability of judges more than of kings. In this country I am afraid the doctrine has been carried to such an extravagant length, that the judiciary may justly be considered like a spoiled child. They are here placed almost beyond the reach of the people, though not beyond the immediate power and influence of the executive. I wish not to see them the slaves of any administration; but the faithful and impartial executors of justice. My desire is that the laws, like the providence of the deity, should shed their protecting influence equally over all.

It will be allowed that the hopes of an individual are as powerful inducements to action as his fears. Whether the executive can depress or exalt him, his influence is equally great. Whether he can punish his errors or reward his faults, his dominion is the same. We all know that an associate judge may sigh for promotion, and may be created a chief justice, whilst experience teaches us, that more than one chief justice has been appointed a minister plenipotentiary. These facts are staring us in the face, when we talk of judges being independent of the government.

Digitized by Google

What has been the natural effect of such conduct? Have the judges stood aloof during the political tempests which have agitated the country? Or have they united in the *Io triumphe* which the votaries and idolators of power have sung to those who were seated in the car of government. Have they made no offerings at the shrine of party, or have they not preached political sermons from the bench, in which they have joined chorus with the anonymous scribblers of the day, and the infuriate instruments of faction. Let a recurrence to past events decide.

I wish to be understood as speaking on these topics in the abstract, and not with a view of imputing improper motives to those concerned in the arrangements which have taken place.

The people of the United States, on the other hand, have no offices of profit and emolument to bestow. They have no post immediately in their power to give, except a station in the House of Representatives, which a judge would not accept from their hands. But let me ask, was there no vacancy in the gift of the executive, to which the defendant could aspire, and to which, his conduct might furnish him with a passport or a letter of introduction?

Some observations have been made on the independence of the judges in England. In that country they are removable by an address of both houses of parliament. By what a slight tenure, by what a slender thread, are their offices held! The voice, nay the whisper, or the breath of the minister for the time being, may remove them, and yet they have generally manifested a spirit of real independence, even in the season of alarm and terror, of which I fear our judges at a similar period cannot boast. But in that country, a seat on the bench is considered as a place of rest, and they look not beyond it. There the judges are not made envoys extraordinary or ministers plenipotentiary.

We ought not to be imposed upon by names in this country. Give any human being judicial power for life, and annex to the exercise of it the kingly maxim "that he can do no wrong," you may call him a

Digitized by Google

judge or a justice, no matter what is the appellation, and you transform him into a despot, regardless of all law, but his own sovereign will and pleasure.

I had nearly omitted stating, but it is worthy of remark, that by the constitution of the union, the chief justice must preside in case the President is impeached, and if the President can at any time send him out of the country to negociate treaties or conventions, he can most effectually prevent the execution of this salutary provision, and shelter himself from punishment.

These ideas are thrown out in reply to the lengthy remarks on judicial independence, to which it was stated, no answer would be given, except some jargon about the sovereignty of the people! They contain a concise commentary on the *theory* furnished by the *text* of practice.

In this country, where the people are justly recognised as the real sovereigns of the land, and the only source of all legitimate authority, it is wonderful to observe the manner in which it is too much the fashion of the times to speak of them. The first article of our political creed, that all power emanates from the people, cannot be attacked by argument, and yet they attempt to turn it into ridicule. On this head they are extremely dextrous. In the course they pursue, they exhibit all the skill of political jockies. They admit the principle that the will of the people should rule, because forsooth they dare not dispute it. But it must not interfere with their own views, or it ceases to be that awful object, that just and legitimate sovereignty which commands respect, and to which they bow with submission. It is no longer the voice of the people, but the clamor of faction. It instantly becomes political jargon, grating to the ears of those who claim the exclusive right, as if anointed with holy oil, of protecting the people from the violence of their own passions, or in plain language, saving them from themselves!

I cannot subscribe to another doctrine of my learned friend, (Mr. Hopkinson) for such I may style him, from the terms of intimacy, at an early period of life, that the people after delegating a portion of authority

Digitized by Google

for their own welfare and advantage to different departments, and subordinate agents, have nothing to say or do with the manner in which such authority is exercised. My position is the reverse. The people should watch with a jealous eye over those whom they have entrusted with authority, to discover whether it is enacted for their benefit or perverted to their detriment. Whether it is exercised for the public good, or prostituted to private purposes. This is the rule in private life, and it will hold equally true in public.

Suffer me, at this place, to notice the remarks of the learned counsel who spoke yesterday (Mr. Harper) with so much sensibility and feeling for his client on the change of parties in popular governments, and the proscriptions, persecutions, and punishments too frequently inflicted by those who are triumphant, on the fallen victims of their authority; when acts innocent in themselves, because against no known law, have been converted into crimes to gratify the vindictive passions of the victorious against those whom the fortune of political war has placed within their power. No man can deprecate more sincerely than I do, such a state of things. To the situation of affairs in this country, I presume these remarks cannot have the most distant application. If they were made with reference to the present administration, to the executive or legislative departments of the government, the allusion may perhaps have the light support of visionary imagination, but has no substantial foundation in reality. It may be fancy, but it is not fact.

The illustrious chief magistrate of the union, has furnished a precedent, by his liberal and enlightened conduct, of which the lamentable annals of mankind afford no example. Under his wise and his mild guidance, what auspicious beams of public sunshine have been diffused over the whole face of the country? Until, to the discontented few the language of the Latin poet might justly be applied,

"O fortunati nimium sua si bona norint."

Digitized by Google

This enlightened policy has been adopted in conjunction with the luminous constellation of distinguished worthies, by whom he is surrounded; whose exalted characters and talents add to the usefulness, the dignity and splendor of his measures, and increase to an extent almost incalculable the general sum of the happiness of this great and independent nation.

Turning our eyes to those who have exercised the high and responsible functions of legislation, we find their acts equally deserving commendation. Their proceedings are calculated to excite at once the envy and the admiration of their opposers and the world. They breathe not the fell spirit of resentment and persecution. To their honor be it spoken, that instead of enlarging the circle of offence they have reduced the scale of criminality. They have abolished an odious, and I believe an unconstitutional sedition law, which had been executed with a rigor and severity perfectly congenial with the passionate policy which gave it birth. The decrees under it, if not written in the blood of the sufferers, were written in their tears. A more dreadful engine of persecution and oppression cannot well be conceived. With this instrument in their hands they could have smote their enemies and shielded themselves. It would have been a sword and a buckler, but they disdained the idea.

Actuated by the best motives, with the honest view of purifying the fountain of justice, and restoring the characters of the American bench, they are now engaged in the unpleasant, but indispensible task, of bringing to exemplary punishment a judge who has offended against the letter and the spirit of the constitution, and the well known statutes of Congress, who has violated the bounden duties of his office, and that high legislative act, which to the sanction of a law, added the solemnity and obligation of an oath.

In this important undertaking they are contending not for themselves, but for posterity; not for those in power, but those whom power has forsaken. Against all the wild theories of new fangled opinions and the monstrous iniquity of exploded doctrines, they wish to

Digitized by Google

teach a lesson of instruction to future judges, that when intoxicated by the spirit of party, they may recollect the scale of power may one day turn, and preserve the scales of justice equal.

We have now arrived at an important point of the discussion, comprehending the constitutional doctrine of impeachments. On this ground the learned counsel have made a formidable stand, and have contended for it with as much zeal and perseverance as if it were the Thermopylæ of their defence. The reason must be obvious. Conscious of the weakness of their cause upon the merits, and sensible that the conduct of their client will not bear the eye of scrutiny, they wish to preclude investigation by arresting us at the threshold of enquiry. To protect a citadel without a palladium, they have endeavored to form of various materials a Scean gate, which it requires no stratagem to enter. The positions, they have piled together without much regard to order and regularity, seem to resolve themselves into the shape of a plea to the jurisdiction of this court over the case. It appears in a strange, anomalous form, both in the answer and their argument, but this is the result I believe when well understood.

One of the counsel have exclaimed, "Look on this dignified tribunal inspiring awe and veneration! Was it constituted for the trial and punishment of such offences as are charged in the articles of impeachment?" Drawing an inference even from the appearance of the judges and of these walls against the exercise of the authority vested in them by the constitution! I would ask, in turn, the counsel to look on his client if he were present; to recollect the elevated post that he fills, the powerful talents with which the bounty of nature has blessed him, the knowledge which he has acquired, the experience he has had—I would say—Behold a man designed to have shone one of the brightest luminaries that ever dignified the profession of the law; formed by nature for the friend and benefactor of society—what has been his conduct? Seated in the curricle of passion, he has driven on, Phaeton like, and destruction has marked his course; persecution and oppression

Digitized by Google

have followed in his wake. His faults and his follies have encreased with his years. Age has added to the rashness and violence of youth. His shining talents and superior knowledge have been employed in support of doctrines fatal to the liberties of his country. The temple of justice has been prophaned by unholy acts, and its altars violated with impious hands. The laws and the constitution have been trampled under his feet. But shall these acts be perpetrated with impunity in this free country? Is it not becoming the dignity of this tribunal to enquire into offences of the highest grade, committed by a judge of the supreme court of the United States? I trust they will consider their talents and their time well employed in this arduous investigation; that neither the elevation of the offender, the boldness with which he avows his acts, nor the ingenuity with which his counsel defend them, will protect him from the impartial sentence of the law. Justice, I must acknowledge, appears in her most attractive form and with the fairest features, when she presents her helping hand to relieve injured innocence from cruel oppression; but she is not less worthy of approbation, when, with a stern countenance, she hurls the bolt at the head of the offender, and inflicts merited punishment on the guilty. In ordinary cases it is necessary, on every exception to jurisdiction, to state the proper forum which has authority to try the questions involved in a cause. The objection must be predicated on the principle that the right to decide is vested in another tribunal. The gentlemen have not been so good as to point out the authority which has cognizance of the offences of judge Chase, and can grant adequate redress, if this court be not vested with that power.

We have been told by that able lawyer, the attorney general of Maryland, that a judge cannot be impeached for any offence which is not indictable, nor indeed for an indictable offence, unless it be an high crime or misdemeanor, and not even for a high crime or misdemeanor, except such as stamp infamy on the character and brand the soul with corruption. A variety of cases have been put to explain his ideas. The law books

Digitized by Google

any logic. The superstructure which, they have erected on this basis, is easily demolished. From the language of this clause they draw the inference that the framers of the constitution intended that no person should be impeached for any offence, for which he was not liable to be indicted. Is this the fair import of the expressions? The text of this instrument is remarkably free from ambiguity. Clearness, correctness and precision are its leading characteristics. With a very few exceptions it speaks a language intelligible by all. Had it been the design and wish of the authors of the constitution, that no offences should be impeachable which were not indictable, they would have declared so in express and positive terms, and left nothing for inference or conjecture. This they have not done, and we may reasonably presume they did not intend to do. They prudently looked into the volume of history, where they saw the shocking purposes to which, in evil times, the power of impeachments had been basely and inhumanly prostituted. They read in those instructive pages the dear bought lessons of experience, and wisely ordained limits, which the authority to punish should not exceed. They fixed a *ne plus ultra* for the tribunal that they established, which their severest judgments should not pass. They knew at the same time that crimes might be perpetrated and offences committed, which would demand additional chastisement. The loss of office and disqualification to hold any in future, the maximum of punishment which they had prescribed, would be very inadequate and bear little proportion to the atrocious guilt which might be incurred. Under the influence of these impressions, they reserved to the tribunals established by law, the right to inflict the just penalties annexed to this class of cases. Without any intention whatever, when any acts had been committed which manifested an unfitness for office, or when there had been a breach of the tenure by which it was held, by mal-conduct or misbehavior, to prevent the proceedings by impeachment, although the case might not be such, as to warrant any additional punishment at law. This I appre-

Digitized by Google

hend is the object they had in view, and this is the fair, easy, natural and obvious sense of the words they have used.

Those conversant with the juridical history of England, or who have studied her political annals, must be sensible of the deplorable situation to which that country has been reduced, at different periods, by the abuse of the power of impeachment. The revengeful exercise of this authority has too often deluged the scaffold with blood.

In that country the proceeding by impeachment for any offence supercedes all other modes. The person accused, whether he be acquitted or condemned, cannot afterwards be indicted for the same offence, or called to an account before the ordinary tribunals. The former course is a complete bar to the latter. To prevent those consequences flowing from a proceeding by impeachment under the constitution, those who formed that instrument, at the same time that they limited the punishment, have expressly declared it shall have no effect to bar a trial before the ordinary courts, but that the party shall be liable to indictment and punishment according to law. Without this positive provision, as we are almost as much in the habit of drawing on the *bank of England* for law as our merchants are for cash or credit, we might have incorporated a principle into our code, totally repugnant to the system. The constitution has drawn the true line on this subject. From a mere reprimand or temporary suspension, the court may ascend in the scale of punishment to removal and disqualification. But thus far can they go and no farther. They cannot pass the Rubicon. If the crime deserves a more exemplary sentence, recourse must be had to the ordinary mode of proceeding, and then their judgment is not pleadable in bar to an indictment. By this means adequate punishment may in all cases be inflicted.

In England every person, in a public or private capacity, either as an officer or an individual, is liable to be proceeded against by impeachment. In this country the sphere of impeachment is properly limited. The

Digitized by Google

attorney general of Maryland has taken a long, tedious and circuitous march to arrive at this point, which I would readily have yielded without an argument. I do not recollect that any of my colleagues contended for the position that every man in this country, in his individual capacity, might be an object of impeachment. For myself I utterly disclaim the idea. Admitting, as I do, in its fullest extent, this wide distinction between the power delegated by the constitution and that exercised in England, which embraces every subject of that kingdom, how does it bear on the case or affect the argument? After laboring for a considerable time, and employing all his talents, and that fund of legal knowledge which is inexhaustible, to prove that the House of Representatives cannot impeach every citizen indiscriminately, the learned attorney general has not favored us with any application of his principle to the present cause. It proves certainly one among many other broad lines of difference which exist between the British doctrines on the subject of impeachment and the constitutional provisions of this country. In this respect it adds to the weight of our scale. It shews how cautious we should be in bowing down to British precedents which cannot be perfectly applicable. I hope I have satisfied the court, that the gentlemen are mistaken in their argument on this part of the constitution. In the general wreck of their defence, I conceive this sinking plank to which they have clung, cannot afford them the most distant prospect of safety.

We will now proceed a little further in the broad and plain road of the constitution, carefully examining the ground on which we move.

By the fourth section of the second article of the constitution, it is provided that,

"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

The learned counsel have placed great reliance on this passage, to prove that an officer must be guilty,

Digitized by Google

not merely of an indictable offence (as they concede every crime or misdemeanor to be) but he must have committed a *high* crime or *high* misdemeanor to justify an impeachment. One of the learned gentlemen, to fix the true construction of the terms "*or other high crimes and misdemeanors*," commented at great length on the expressions. To illustrate the subject his fancy readily formed an objection, which with logical accuracy he removed. He demonstrated that agreeably to the strictest grammatical construction and the nicest propriety of speech, the epithet *high* was to be considered as prefixed to misdemeanors as well as to crimes. In this manner the phantom, which his own imagination raised, was laid not by a *spell*, but by the exertion of his argumentative powers. We would willingly have conceded the point, and spared him his labor and his breath. We mean not to cavil about trifles, or dispute for straws.

Taking it for granted that he has given the proper construction to a *part*, let us examine what is the just sense of the whole of this passage. In plain English, it commands, upon the conviction by impeachment of certain atrocious offences, that the guilty officer shall be removed at all events. Depriving the court thus far of the discretion which they would otherwise have possessed, as to the judgment they might pass. Having previously limited, in general cases, the punishment which they might inflict according to their discretion, by establishing a maximum which they should not exceed, in this particular grade of flagrant offences, they have fixed the sentence which they shall pass. The language of the constitution is peremptory and imperative. Those convicted of such daring enormities, of those *high* crimes or *high* misdemeanors must be removed from office, which they have justly forfeited. This is the minimum of punishment to be inflicted. Perhaps those who penned the great charter of the Union apprehended, that in evil times, some high officer of the United States, cloathed with power and armed with influence, might be proved to have committed the base and detestable crime of bribery, or some other equally great, by

Digitized by Google

evidence too strong and too powerful to be resisted, and in an unfortunate hour, awed by fear or seduced by favor, the constitutional judges would not hurl him at once from the seat which he was unworthy to occupy, but permit him to remain in his station to the disgrace of the country and to the injury of the people. Hence they were induced to make this wholesome provision which left nothing to the discretion of the judges. But is there a word in the whole sentence which expresses an idea, or from which any fair inference can be drawn, that no person shall be impeached but for "treason, bribery, or other high crimes and misdemeanors." It does not pretend to specify the various acts of an officer which may subject him to an impeachment, its whole object is to define and fix the punishment which he shall incur on the commission of particular offences, which is removal from office. This is the least penalty they can inflict in such cases, and God knows it would be much too little, had they not in the former part provided, that after stripping the traitorous impostor of the insignia of office and power, the ordinary tribunals may add to the constitutional sentence of the Senate the fines or forfeitures imposed by law.

From the most cursory and transient view of this passage, I submit with due deference, that it must appear very manifest that there are other cases than those here specified for which an impeachment will lay, and is the proper remedy. In these particular cases the punishment is ascertained, to wit, removal from office; but in a clause to which I have sometime since adverted, it is discretionary. Where was the necessity or use of *that*, if *this* defined all the impeachable offences, and specified the punishment? We must, if possible, give effect to every sentence of this instrument. We must not suppose that its authors made nugatory provisions. The sense and meaning which I have given to their language, and the constructions which I have maintained, will give force and effect to every word.

The system of impeachment thus understood, and I humbly submit rationally explained, is perhaps as little liable to exception as any other branch of the constitu-

Digitized by Google

tion. It is stripped of those terrible instruments of death and destruction, which have made such dreadful havoc and carnage in the ages that have preceded us. We have been benefited by the sanguinary precedents of barbarous times. We have been taught wisdom ourselves by the folly of others. We have improved the advantages we possessed, and thus, according to his own inscrutable ways, has the benevolent Author of our existence brought good out of evil.

In guarding effectually against the cruel and vindictive punishments which the extraordinary tribunal of impeachment might inflict, in the exacerbations of party violence and personal animosity, the fathers of the constitution took care to provide that a certain *grade* of offences should deprive the guilty incumbent of his office, thereby rendering him a harmless object to the community, when dispossessed of his abused authority. Nay, they went further. Their wisdom and prudence led them to make a specific declaration, that after being deprived of his power, he should be subject to the legal consequences of his guilt, upon trial and conviction before the ordinary tribunals at law. Thus rendering the system perfect and complete.

There is an important provision contained in the constitution, intimately connected with this subject, to which I now beg leave to refer. It will be found in the first section of the third article.

" The judicial power of the United States shall be " vested in one supreme court, and in such inferior " courts as the Congress may from time to time ordain " and establish. *The judges both of the supreme and* " *inferior courts shall hold their offices during good* " *behavior.*"

With this particular part of the constitution, the learned judge must have been more especially acquainted, when he accepted of his present office, and must then have expressly accepted it on the terms specified. No man can seriously say that for a judge to continue in the exercise of his authority and the receipt of his salary, after any acts of misbehavior, is not a violation of this essential provision of the constitution. He

Digitized by Google

holds his office explicitly and expressly *during good behavior*. The instant he behaves bad, he commits a breach of the tenure by which he holds the possession, and the office becomes forfeited. The people have leased out the authority upon certain specified terms. So long as he complies with them, and not a moment longer, is he entitled to exercise the power which was not intended for his individual advantage, but for their benefit. But, sir, who is to take notice of these acts of misbehavior? How are they to be ascertained, and what shall be considered as such? Are the people in their individual capacity, *ipso facto*, on the commission of the act to declare the office forfeited, and is a judge then to cease from his labors? Or must it not be officially, or rather judicially ascertained? This, I conceive, would be the proper mode of procedure. Has the constitution provided no tribunal for this purpose? I answer, it has, most indubitably. By the constitution the Senate, as the court and jury too in cases of impeachment, has the sole power of removing from office those who hold them by the tenure of good behavior. If a judge misbehave he ought to be removed, because agreeably to the plainest provision he has forfeited his right to hold the office. The constitution, having established this single mode of removal, and having declared that a judge shall hold his office only during good behavior, it becomes the duty of the representatives of the people, as the grand inquest of the nation vested with the general power of impeachment, when they know, of their own knowledge, or from the information of their constituents, that acts of misbehavior have been committed, to present the delinquent to this high tribunal, whose powers are competent to enquire into the case and apply the remedy; whose authority is co-extensive with the complaint, commensurate with the object, and adequate to the redress of the evil. Shall it be said that it is true the constitution has declared that a judge shall hold his office no longer than he behaves himself well, and that though he behaves never so ill, it has provided no means to turn him out of office, if he has the hardihood to remain in his

Digitized by Google

seat? If such a doctrine be contended, it is too preposterous to receive the sanction of this court. It would render this provision nugatory indeed. It would do more, it would be establishing the principle that whether they behave well or ill they must continue in office, because there was no mode fixed for removing them. This would be the strongest construction that plain language, obvious to the common sense of the most unlettered man, ever received in a court of justice. The method I have pointed out solves all difficulties at once, and releases us from every embarrassment on this subject. It makes the constitution consistent with itself and preserves uniformity throughout all the parts.

The learned counsel were compelled to make a shew in maintenance of unsound doctrines, to give the appearance of support to positions equally untenable.

I flatter myself that every member of this court is by this time convinced that if a judge misbehave, he should be deprived of his office, because guilty of a breach of the tenure by which it is held. That any acts of misbehavior must be judicially enquired into and ascertained. That the constitution having delegated to the House of Representatives exclusively, the general power to impeach, acts of misbehavior are proper subjects of impeachment, upon conviction of which the Senate has the authority to remove an officer, and is bound to exercise it. Shall we be told then, that no matter how gross the acts of judicial misbehavior, or how flagrant the misconduct of a judge, he cannot be removed from office, nay, he cannot be impeached, unless guilty of *treason* or *bribery*, or some crime equally great! Sir, it is impossible that the intelligent understandings and the mature judgments of this court could countenance for a moment such an idea.

The terms "*during good behavior*," appear to have been considered as very vague and indefinite, by the learned counsel for the defendant, from the manner in which they have argued the case. When in the strong, nervous language of my honorable friend, the conduct of the accused has been described in the most appropriate terms in the articles of impeachment; they have

Digitized by Google

treated them with levity, as if they did not understand their import, because they admitted of no serious refutation. The clear explanation of the expressions *during good behavior*, and the lucid exposition of this passage, contained in the charges themselves, they seem unwilling to comprehend. The commentary is as unintelligible as the text. When to such conduct as was never before witnessed in a court of justice is applied the epithet of *novel*, we have been told by one counsel, that the term is too uncertain to be comprehended. No precise idea can be affixed to it, nor is the language sufficiently technical to constitute a criminal charge. When behavior the most rude and contumelious, disgraceful on any occasion, but truly degrading on the bench, and unquestionably criminal, because calculated to bring the judiciary into the lowest contempt, and to excite universal indignation against the tribunals of the country, is pourtrayed in the impressive style of truth, the age of captious sophistry or technical bigotry is resorted to, for proving there is no sense or meaning in the charge. Upon what an ocean of uncertainty have we embarked when the plainest language is not understood! If sound, solid common sense were to be confounded by technical jargon, the tower of Babel would not present a greater confusion of tongues. Sir, when the gentlemen cannot but feel the force of these charges, with what admirable ingenuity do they attempt to evade them. Is this tribunal, say they, to erect itself into a court of honor, or assume the chair of chivalry, and form a scale by which decorum and good manners may be nicely graduated? Is every slight deviation from the line of politeness at an assembly or drawing room to be marked with accuracy and chastised with severity? The testimony furnishes apt and ready answers to those questions. The learned judge is not arraigned, because he does not possess the polished manners of an accomplished gentleman, but for outraging all the rules of decency and decorum, by conduct at which the plain sense of every honest man would revolt.

I beg this court seriously to consider whether a judge may not be guilty of acts of misbehavior inferior in cri-

Digitized by Google

minality to treason or bribery, for which he ought to be impeached, though no indictment would lay for the same. When gentlemen talk of an indictment being a necessary *substratum* of an impeachment, I should be glad to be informed in what court it must be supported. In the courts of the United States or in the state courts? If in the state courts, then in which of them, or provided it can be supported in any of them, will the act warrant an impeachment? If an indictment must lay in the courts of the United States, in the long catalogue of crimes there are very few which an officer might not commit with impunity. He might be guilty of treason against an individual state, of murder, arson, forgery and perjury in various forms without being amenable to the Federal jurisdiction, and unless he could be indicted before them, he could not be impeached! Are we then to resort to the erring *data* of the different states? In New-Hampshire drunkenness may be an indictable offence, but not in another state. Shall an United States' judge be impeached and removed for getting intoxicated in New-Hampshire, when he may drink as he pleases in another state with impunity. In some states witchcraft is a heinous offence, which subjects the unfortunate person to indictment and punishment; in other states it is unknown as a crime. A greater variety of cases might be put, to expose the fallacy of the principle, and to prove how improper it would be for this court to be governed by the practice of the different states. The variation of such a compass is too great for it to be relied on. This honorable body must have a standard of their own, which will admit of no change or deviation. The test by which they will try an impeachment cannot be that of indictment. Even in England, to whose practice and whose precedents such constant recourse has been had, the learned counsel have not adduced a single case where a judge of one of their *superior courts* has been *indicted* for any mal-conduct in office. Nay, I believe I may defy them to shew an example of the kind. The best authorities tell us they are not subject to indictment, but may be proceeded against by impeachment. They have been impeached, convicted and pu-

Digitized by Google

nished for giving opinions which they knew to be contrary to law, and for a variety of misdeeds, but never in a solitary instance that I know of, have they been indicted. I think I can put so many striking cases of misconduct in a judge, for which it must be admitted that an impeachment will lay, though no indictment could be maintained, that the learned counsel themselves must be compelled at length to surrender this post at discretion, without any terms of capitulation. I will not state the case of a judge wilfully and designedly neglecting to hold a court on the day prescribed by law, for I am aware of the answer gentlemen would give, that it is an offence against a particular provision. But let us suppose judge Chase, to comply with the forms of the law, at the time appointed, should appear and open the court, and notwithstanding there was pressing business to be done, he should proceed knowingly and wilfully to adjourn it until the next stated period. He would be guilty of no violation of any positive law, for which he might be punished by indictment—but ought he not to be impeached? Suppose he proceeded in the dispatch of business, and from prejudice against one party, or favor to his antagonist, he ordered on the trial of a cause, though legal grounds are exhibited, for postponement. Is this not a proper subject of impeachment? And yet there is no express law infringed. If when the jury return to the bar to give the verdict, he should knowingly receive the verdict of a majority. Is there any positive provision by which a jury shall be composed of twelve men and that their decision shall be unanimous? I believe even the learning of that profound lawyer (Mr. Martin,) from the reading of laborious years and the indefatigable researches of a life devoted to the pursuit of his profession, could not shew any positive provision in the constitution of the United States or any statute of Congress on the subject. So far from it being originally necessary in civil cases, that a jury should be unanimous, the late judge Wilson, (a great and venerable authority) *magnum et memorabile nomen*, asserts that a majority always decided agreeably to the primary principles of that

Digitized by Google

valuable institution. Again, there is no man so ignorant as to be insensible to manifest violations of the sanctuary of a court. It was never intended as a stage for the exhibition of pantomimes or plays. Were a judge to entertain the suitors with a farce or a comedy instead of hearing their causes, and turn a jester or buffoon on the bench, I presume he would subject himself to an impeachment, and yet there is no positive law preventing a court from being converted into a theatre, or if preferring the buskin to the sock, he should exhibit a tragic scene, in which an unfortunate fellow citizen might find himself *really* no *actor*, in the part which he bore, I should presume his conduct would claim the attention of the House of Representatives as the grand inquest of the nation. It must be unnecessary to multiply examples of misconduct in a judge against the known law of his duty, so manifest at first blush that the most callous conscience cannot be insensible to them, not minutely specified and described (for that would be impossible) by particular provisions in any legislative act, but all embraced and comprehended in the solemn oath which he takes to perform his duty faithfully and impartially as a judge. As a judge he is bound to execute the laws. Every opinion which he gives and every sentence which he passes, must be in conformity to law and be authorized by it. It ought to be the judgment of the law and not his own individual opinion. If he wilfully make a decree not sanctioned by law he is guilty of misbehaviour as a judge, for it is a glaring violation of the fundamental principles of his office. I shall have occasion in the course of my argument to advert to judicial opinions delivered by the accused which there was no legislative act to warrant, no precedent to authorise, no principle to sanction, and which the utmost latitude of legal discretion would not justify. In such a case, if this court be satisfied that he acted innocently wrong, that it was an honest error of judgment which led him astray, he will no doubt stand acquitted. But if from a concurrence of circumstances they are convinced that he erred through design from prejudiced and partial motives, though he may not

Digitized by Google

have been corrupted by a bribe, they will consider him as a proper subject of their jurisdiction and a proper object for the exercise of their authority.

The doctrines of the learned counsel for the defendant would lead to a conclusion which they may not have contemplated, but which the country would feel. Time would fail me to enumerate the different offences of various grades which a judge might commit, and for which he ought most assuredly to be impeached, tho' no indictment could be maintained in any of the Federal courts. If their positions were correct a judge might violate all the ten commandments without subjecting himself to impeachment and removal—for I know of no method of removal but through the medium of an impeachment. There is no law of the United States prohibiting drunkenness on the bench, or indeed punishing this vice at all, unless we look into the laws of a naval or military court martial, and yet a judge certainly ought to be removed from office if guilty of habitual intoxication. The use of prophane or obscene language by a judge is not expressly proscribed by any act of Congress with which I am acquainted, though if it were forbidden in general terms gentlemen might say with as much propriety as they have done in other cases, in the course of their argument, that every term considered as such, ought to be enumerated, and yet I believe should a judge in his place be guilty of taking the name of his God in vain, of cursing and swearing on the bench, or using the obscene language of Billingsgate or St. Giles, he ought to be impeached and removed. The sanctity of a court should be preserved unsullied and the officer displaced who was capable of exhibiting so shocking an example calculated to destroy all respect for, and confidence in the judicial establishments of the country, and to corrupt the morals of the nation. But sir, why need I enlarge on this subject—The counsel for the defendant have appeared at one stage of their argument to possess great respect and deference for precedent. To consider cases solemnly argued or deliberately adjudged, as fixing the law so perfectly, as to justify a court in absolutely preventing any coun-

Digitized by Google

sel, even though concerned for a criminal, and that too in a capital case, from questioning principles thus established. If precedent will furnish us with a clue to the intricate labyrinth, in which they have attempted to involve us, we are in possession of one equal to that of Ariadne.

Suffer me again to refer them to the precedent which I cited a few days since. I allude to the case of judge Addison in Pennsylvania. One of the counsel (Mr. Martin) for whose legal erudition I feel the greatest respect, has endeavored to impeach the authority of the highest tribunal in that state, and has asked if that decision is to be a precedent for this court? I was the more surprized at this, because his colleague (Mr. Lee) had cited in the course of his argument, a case from Kirby's Connecticut reports, decided by chief justice Elsworth and his associates. I ask, sir, in reply, whether, when a case determined in one of the ordinary courts of Connecticut, has been produced by the opposite counsel, as entitled to consideration, the decision of the Senate of Pennsylvania, the highest court of criminal judicature in that commonwealth, ought not to be respected. Permit me to add that in my humble opinion, there is as much propriety in referring to such examples as in recurring to British precedents. I have said and with increasing confidence I repeat it, that this case under the constitution of Pennsylvania, is emphatically stronger than the present under the constitution of the United States, on the much litigated question, whether a judge can be impeached for any act, for which he cannot be indicted. In the constitution of Pennsylvania, Article 5th and Section 2d, there is a provision not to be found in the constitution of the United States, by which a judge for any reasonable cause, which shall not be sufficient ground of impeachment, may be removed by the governor on the address of two thirds of each branch of the legislature. This provision would seem to be intended to meet the distinction which the learned counsel have labored to establish. In this light, judge Addison himself on his trial considered it and pressed the point most forcibly on the Senate of Pennsylvania. He

Digitized by Google

had the strongest interest in so doing. If this course had been pursued he would have merely lost his office, but upon conviction by impeachment, he dreaded the disqualification to hold any office which the Senate might annex to the judgment of removal. But, sir, this is not the only reason, cogent as it is, for considering the case of Judge Addison particularly applicable to the present. It so happens that we have a decision of the supreme court of Pennsylvania on the very objection which the gentlemen now take, when the conduct of judge Addison was brought before them previous to his being impeached. If the learned counsel will not give full faith and credit to the determination of the Senate of Pennsylvania, perhaps they will admit the authority of her supreme court. I hope this tribunal at least will give it equal weight with that of the supreme court of Connecticut. A very correct account of the case will be found in the statement of the Attorney General on the trial of Judge Addison taken in connection with a printed report of the case which was produced by Mr. Dallas on that occasion. I will not detain this honorable court with reading all which is there recorded on this subject, but will refer to pages 51, 52, 64 and 69 of Addison's trial, and endeavor to present them with an accurate view of the case.

On the ground of an affidavit filed by J. B. C. Lucas, then an associate judge of the same court in which judge Addison presided, stating that judge Addison on a particular occasion, after having delivered a charge to the grand jury himself, had prevented judge Lucas from addressing them by ordering a constable to be sworn and the jury to be taken from the box, the Attorney General moved for leave to file an information against Mr. Addison.

The Attorney General made two points. First, that judge Lucas had an equal right with the presiding judge to deliver a charge to the grand jury, on principle and authority. The chief justice Shippen immediately observed, that it was unnecessary to speak to that point or to read authorities, "*speak to the second point—Is "this conduct the subject of an information?*"

Digitized by Google

After the argument was closed, the opinion of the court (judge Brackenridge taking no part) was delivered by the chief justice, who stated that the proceeding was arbitrary, unbecoming, unhandsome, ungentlemanly, unmannerly, and improper, but "*that it was* "*not indictable, nor the subject of an information,*" and that there was another remedy. Referring no doubt to an impeachment, for the attorney general states in page 52, "That from what fell from the judges of "the supreme court when the case was before them, it "might be easily inferred, that impeachment was the "proper mode to correct the evil complained of."

Thus we have the solemn adjudication of the supreme court, that conduct in a judge may be impeachable though no indictment can be maintained for it. We could not have formed for ourselves a precedent more apposite.

An impeachment was accordingly presented against judge Addison by the constitutional authority, to the Senate of Pennsylvania. Pardon me for trespassing so much on your time as to read distinctly the articles, in order to put this court in possession of the whole case.

ARTICLE I.

"That the said Alexander Addison, being duly appointed and commissioned president of the several courts of common pleas, in the circuit consisting of the said counties of Westmoreland, Fayette, Washington and Allegheny, within the territory of the said commonwealth, while acting as president of the court of common pleas of the said county of Allegheny, on Saturday, the twenty-eighth day of March, in the year of our Lord, one thousand eight hundred and one, in open court of common pleas, then and there holden, in and for the county last aforesaid; did after John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the court of common pleas of the county last aforesaid, had in his official character and capacity of judge as aforesaid, and as of right he might do, addressed a petit jury, then and there duly impannelled and sworn or affirmed respective-

Digitized by Google

ly as jurors, in a cause then pending, then and there openly declare and say to the said jury, "that the address delivered to them by the said John Lucas, otherwise John B. C. Lucas, had nothing to do with the question before them, and that they ought not to pay any attention to it," thereby degrading, or endeavoring to degrade and vilify the said John Lucas, otherwise John B. C. Lucas, and his character and office as aforesaid, to the obstruction of the free, impartial and due administration of justice, and contrary to the public rights and interests of this commonwealth."

ARTICLE II.

"That the said Alexander Addison, being duly appointed and commissioned president as aforesaid, did, at a court of quarter sessions of the peace and court of common pleas, holden in and for the county of Allegheny aforesaid, on Monday the twenty-second day of June, in the year of our Lord, one thousand eight hundred and one, under the pretence of discharging and performing his official duties as president aforesaid, unjustly, illegally and unconstitutionally claim, usurp and exercise authority not given or delegated to him by the constitution and laws of this commonwealth, inasmuch as he, the said Alexander Addison, president as aforesaid, did, under pretence as aforesaid of discharging and performing his said official duties, then and there, in time of open court, unjustly, illegally and unconstitutionally stop, threaten and prevent the said John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the said courts, from addressing, as of right he might do, a grand jury of the said county of Allegheny, then and there assembled and impannelled, and sworn or affirmed respectively concerning their rights and duties as grand jurymen, thereby abusing and attempting to degrade the high offices of president and judge as aforesaid, to the denial and prevention of public right, and of the due administration of justice, and to the evil example of all others in the like case offending."

Digitized by Google

You have now a clear and comprehensive view of the grounds on which the impeachment was supported. The first charge accuses judge Addison of speaking, in terms very unjustifiable for a president of a court, of an address delivered to a petit jury by his associate, judge Lucas. The language which he used, and the manner in which it was proved to have been delivered, are equally exceptionable. His conduct was rude, ungentlemanly and utterly inconsistent with that decorum and respect which should be inculcated and practised on the bench, to preserve the credit and the character of a court of justice. Its object and tendency was to deter Mr. Lucas from exercising his judgment and expressing his opinion from the bench, and to reduce him to a perfect cypher.

The other charge was for preventing judge Lucas from addressing a grand jury. This was effected in the same rude and insolent manner, as will appear from the testimony of judge Lucas himself, in pages 33 and 37 of the printed trial.

To support the first article, I believe it would not be possible to find any positive act or special provision prescribing what particular language a president of a court may use, and what he shall not, in reference to the opinion which an associate justice may have delivered. There is no legal barometer for weighing words, nor any particular law embracing all the variety of cases of lighter and darker shades which may occur. The learned counsel who supported the prosecution did not cite a single precedent even of the kind. There may have been a law to be found in the breast of every man of common sense and common manners, with which judge Addison was not unacquainted, and upon which the Senate considered themselves perfectly justified in convicting him. This was the general but clear and comprehensive law, which marked his rights and duties as a judge. The law of his office prescribed by his oath.

The second article for preventing an associate judge from delivering a charge to a grand jury, after they had received one from the president of the court, could not

Digitized by Google

have been maintained on the ground of any express statute or legal usage. It is the first time I ever heard of such a case. The uniform practice in the courts to which I have been accustomed is for the chief justice or president to deliver the charge. This was more especially the case in the court in which judge Addison presided, for it appears they had adopted a positive rule on the subject. The practice of a court of justice is generally considered as the law of that court. But the Senate, believing on principle (and believing correctly) that the power of all the judges of the court was equal, pronounced a sentence of condemnation.

With these plausible circumstances to countenance him, judge Addison, a gentleman of considerable celebrity both in the legal and political world, and of unquestionable talents, conducted his own defence. His principal reliance was on the very objection which the learned counsel for the present defendant now make. He contended that he had committed no act for which he was liable to indictment, and that he was therefore not subject to impeachment. In the position that his conduct was not indictable, he was supported by the opinion of the supreme court, who had nevertheless considered it a fit subject for impeachment. His argument was able and ingenious, but, sir, his objection was anticipated or answered in such a masterly manner, by a chain of reasoning so irresistible, that it produced complete conviction on the minds of the Senate of Pennsylvania. This honorable court know the result. He has been not only removed, but disqualified to hold the office of judge in any court of law in that state.

We have then the deliberate opinion of the Senate of Pennsylvania, upon solemn argument, confirming the decision made by her supreme court. If these cases do not furnish us with lessons of instruction, I know not where such lessons are to be read.

I will remark, sir, further in relation to this case, that had it not been for the extreme anxiety of judge Addison to propagate his political dogmas from the bench, he would never have been reduced to this serious dilemma. Like the defendant, he converted the sa-

Digitized by Google

cred edifice of justice into a theatre for the dissemination of doctrines, to which I hope I shall never subscribe. If I have a desire relative to the administration of justice, paramount to all others, it is that party and party spirit should be banished from every court. My sincere and fervent prayer is, that the laws, like the providence of God, may shed their protecting influence equally over all, without respect to persons or opinions.

I have been requested by the attorney general of Maryland to state another and a recent case which has happened in Pennsylvania. For his satisfaction I will briefly inform this honorable court of all that took place on that occasion, in the least degree applicable to the present trial. Three of the judges of their supreme court were accused of fining and imprisoning, without the intervention of a jury, a fellow-citizen, for publishing a paper which they considered as a contempt of court. The judges were defended by two most able and eloquent counsel, who contended that the constitution, the laws and the practice of Pennsylvania, by adopting the common law doctrines on the subject, justified the proceeding; and that if there was no law to justify it, their conduct flowed from an honest error in judgment, for which they were not liable to impeachment. But, sir, they did not attempt to maintain the position contended for on this occasion, that to support an impeachment the conduct of a judge must be such as to subject him to an indictment. Nor could they, with any consistency, have supported such a doctrine, for their clients had before, in the case of Mr. Addison decided, that his conduct was not a proper subject of impeachment though it might be of indictment.

This precedent then fortifies the former decisions on this point, and adds another authority to those which previously existed, and to which I have adverted.

The judges were acquitted, I acknowledge, and were I to hazard an opinion, I would say because some of the members of the Senate of Pennsylvania thought their conduct proceeded from an honest error of judgment. If this court shall be of the same opinion with

Digitized by Google

respect to the conduct of judge Chase, I trust they will follow the precedent and acquit him, and I shall cheerfully acquiesce in the decision.

I fear I shall fatigue this honorable court by noticing the various cases on this subject, but I cannot omit pressing on their attention a decision of the most authoritative and binding nature, because it is one of their own. The case to which I allude and its attending circumstances must be fresh in the recollection of every member of the Senate. The district judge of New-Hampshire was impeached for habitual drunkenness on the bench, and for using prophane and indecent language. It was not in evidence to the court that drunkenness or prophane and indecent language were indictable by any law of that state. There is no law of the United States, unless we recur to the naval or military code, punishing those vices as offences. Of course, sir, it was not pretended by the managers on that occasion, of whom I had the honor to be one, that any indictment could be maintained against judge Pickering in any civil court of the United States, or of the individual state of which he was a citizen. I appeal to your recollection, sir, for the accuracy of this statement, and let me ask what was the result? A constitutional majority of the Senate pronounced a verdict of guilty and passed a judgment of removal.

One of the counsel (Mr. Harper) of whose argument I may be permitted to observe, without disparagement to the talents and learning of his colleagues, that it contained an able and masterly defence of the conduct of the accused, sunk beneath the weight of this stubborn and conclusive precedent. It was a stumbling block which he could not remove out of his way; and he seemed compelled, reluctantly, to yield the principle to the decisive authority and pointed application of the case.

We have then the whole weight of American authority in our scale, whilst the learned counsel have not been able to adduce a single precedent, foreign or domestic, against us. When I speak of precedents, I do not allude to the obscure *dicta* which may be found by turning over the dark lanterns of tradition in remote

Digitized by Google

ages of antiquity, or to the interpolations which may be scattered through the marginal references to the abridgements, by unknown editors; but to some authoritative case which has occurred since the regular date of parliamentary impeachments. The fines which Edward I. imposed on some of his judges, in what manner is not certainly known, to replenish, as many have supposed, an exhausted treasury, are familiar to every student. But from the period of impeachments to the present time, I believe no instance of an indictment can be shewn against a judge of the Common Pleas, Exchequer, or King's Bench in England, nor against a Lord Keeper or Lord Chancellor, who hold their offices to this day, let it be remembered, *during pleasure*. The civil business of the court of Chancery is more important than that of all the other courts, and the decisions of that tribunal have been as impartial I believe as any, notwithstanding the high sounding doctrines of judicial independence. There have been many impeachments, and judges have sometimes been complained of by information in the execrable star chamber, but there have been no indictments at law. The star chamber has been long since abolished, and the sole method of proceeding against judges of the superior courts now is by impeachment. The best writers agree, "*that judges of record are freed from all pre-*" *sentations whatever, except in parliament, where* " *they may be punished for any thing done by them in* " *such courts as judges.*" Numerous authorities might be cited on this subject, but I shall content myself with barely referring to them. 1 Hawk. 192, chap. 73, sec. 5, 1 Salk. 396, Woodeson 596, Jacob's law dictionary, title *Judges*, 12 Co. 25, 26.

Were I to rest the point here, I confidently believe we should be perfectly safe, but I will proceed further, agreeably to my engagement, in the commencement of my argument, and demonstrate that according to their own principles, and authorities, judge Chase has been guilty of crimes and misdemeanors, in the strictest technical sense of the terms, for which he ought to be punished in an exemplary manner.

Digitized by Google

In contesting the principle that no act is impeachable unless it be also indictable, I have not contended for the position attributed to me by the learned attorney general of Maryland, that a judge may be impeached for conduct which is not criminal. On the contrary, we rely on supporting this as a criminal proceeding, and the gentlemen are entitled to every advantage which they can reap from this declaration.

I have had occasion to state that I considered every act of misbehavior in a judge as a misdemeanor, and the attorney general of Maryland has expressed in strong terms his perfect agreement in the opinion, that misbehavior is synonimous with misdemeanor. He appeared to imagine that he gained a great advantage by making this concession, and I am content to give him the full benefit to be derived from it. I shall not shrink from the position, but meet the gentleman with pleasure and confidence on this ground. I love to break a lance in the open field of discussion, and disdain every kind of ambush in argument.

As we agree in one point, that misbehavior and misdemeanor are convertible terms, Jacob's law dictionary, which quotes the language of judge Blackstone in his commentaries, has been recurred to for a definition of a misdemeanor. Let us try the conduct of judge Chase by this text.

"*A crime or misdemeanor*," (says judge Blackstone) "*is an act committed or omitted, in violation of a public law either forbidding or commanding it.*" "*This general definition comprehends both crimes and misdemeanors, which properly speaking are mere synonimous terms.*"

There is a *public law* that prescribes the following oath which judge Chase took on his entrance into office; 1 vol. pa. 53.

"*I do solemnly swear, that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially perform all the duties incumbent on me as a judge of the Supreme Court, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.*"

Digitized by Google

Who that reads this solemn and impressive provision and looks at the plenary evidence we have before us, can hesitate to pronounce the respondent guilty of violating a public law, which he was bound by the most sacred of all human obligations to execute with fidelity? His oath informed him that the law, like the Gospel, was no respecter of persons, and yet what have we beheld in his conduct, when a poor, unfortunate Fries, or a wretched Callender was before him, upon a criminal charge? I appeal to the testimony which I shall by and by comment upon, whether his acts do not prove that he marked them out as victims to be sacrificed on the altar of party. Sir, I cannot believe that gentlemen will seriously contend that the expressions, "*faithfully and impartially to perform his duties*," have no definite meaning; that conduct grossly prejudiced and the most shameless partiality shall be considered as no violations of his solemn oath. If they did, I have too exalted an opinion of the good sense and discernment of the court to believe they would countenance such an idea. Their import is certainly plain and obvious, without recurring to the black lettered lore for explanation. What then was the conduct of the respondent to Fries, if testimony not only unimpeached but unimpeachable is to be believed? Was he not prejudiced both against the unhappy prisoner and his case, which he had from a superabundance of zeal completely prejudged? Or, sir, when he declared Callender ought to be hung, and set off with his miserable pamphlet in his pocket, ready scored for his purpose, and proceeded in the most arbitrary manner with his trial, was he impartial, or was he not guilty of the most manifest and daring partiality? Shall he be guilty of all these outrages against the plain language of a public statute, which combines the obligation of an oath with the sanction of a law, and yet be innocent of any crime or misdemeanor? If gentlemen will hold up the acts of Congress in one hand and the acts of judge Chase, proved by the testimony, in the other, they will see and be satisfied, that within the strictest legal definition he has been guilty of repeated and aggravated vi-

Digitized by Google

olations of public law, and therefore unquestionably of crimes and misdemeanors.

The constitution, however, is declared to be emphatically the supreme law of the land. This sacred instrument he was bound by a twofold oath to preserve inviolate. All executive and judicial officers of the United States, independent of their oaths of office, are bound by oath to support the constitution—Art. 6, sect. 3.

By the seventh article of the amendments of the constitution, which have been duly ratified, and therefore now form part of that instrument, it is declared, that

"*In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.*"

This article secures to every accused individual the right of a trial by an impartial jury. Without their unanimous consent, no matter how eager the government are for conviction, no person can be punished. Where any man is charged in due form with the commission of a crime, and pleads he is not guilty, the jury are to decide on the whole case whether he be innocent or not. Their verdict must be commensurate with the issue joined, which involves both fact and law, which they have indubitably the right to decide, agreeably to the express and positive provision of the constitution. This right, therefore, is an original right, flowing from the highest authority. It is beyond doubt a principle and not an incidental right. It is not a right incidental to the trial, but it constitutes the trial itself; for there can be no other trial in the case but by jury.

This same amendment guarantees to the accused the assistance of counsel. How important is this privilege, when it is recollected that veterans of the bar are gene-

Digitized by Google

rally selected to prosecute. The situation too of an innocent man, charged with the commission of a crime, is delicate and embarrassing. It excites frequently apprehensions which unfit him for making a defence. I feel myself compelled to declare upon the authority of the testimony in this case, that the respondent has been proved guilty of violating the supreme law of the land in those great essential provisions. He has deprived accused individuals of a trial by jury, for he would not suffer the jury to decide, or even to hear argument on the subject of the law, and he has deprived them of the benefit of counsel by conduct which drove counsel from the bar. This has happened in more than one instance, and above all, an injured fellow citizen has been stripped of his invaluable privileges in a capital case. Is this imagination or is it reality? Let the recorded testimony determine. If, however, I am correct, must I not have satisfied this honorable court, agreeably to my promise, that taking the learned counsel's own definition, and relying upon his authorities, I have demonstrated that the accused has been guilty of crimes and misdemeanors. But have I not gone further, and shewn that he has been guilty of high crimes and misdemeanors, and such as disqualify him for a seat on the bench, so as to come fully within the rule which he has laid down?

God forbid that it should be said, when a judge is guilty of grossly violating not merely a public law, but the supreme law of the land, nay, a law which he was bound by two solemn oaths to support, he is not guilty of any crime or misdemeanor; or that when he violates this supreme law which he is thus obligated to respect, for the purpose of depriving a fellow citizen, accused of a capital crime, of the benefit of counsel, and the inestimable right of trial by jury, he shall not be declared guilty of high crimes and misdemeanors, which evince a want of integrity, and mark a depravity of heart that completely disqualify him for a judicial office.

I have now finished my observations in reply to the preliminary objections which have been made to this mode of proceeding, and have been reluctantly compel-

Digitized by Google

led to discuss them at much greater length than I at first contemplated, from the zeal and pertinacity with which they have been urged and insisted on by the learned counsel opposed to us. Under the impression that I have been successful in this undertaking, I shall hasten to the investigation of the articles themselves.

To the observations which have already fallen from me on the subject of the technical refined exceptions that have been taken to the language of the articles, I shall only add a remark or two in reply to what fell from one of the counsel (Mr. Lee) when commenting on the 5th and 6th articles.

He appeared to consider the House of Representatives bound down to the same strict and technical forms required in the ordinary courts of justice. Even there I believe suitors are too often caught in this miserable net, which is calculated to hold a shadow and let the substance escape. But the legal maxim, if I am correctly informed, applicable to impeachments, is, that they whose duty it is to present them, may speak in plain, common language, *loquendum ut vulgus*—Foster 389, 90; 2 Woodes. Lect. 607. I believe if we were to try the articles either by the test of technical nicety or the standard of common sense, they would be found on examination correct in form and substance. The articles particularly excepted to charge the respondent with committing acts in violation of certain public laws of the United States, either enacted by Congress or adopted by their statutes. If this be not a sufficient allegation of criminality, I know not what would constitute an offence. Suppose an act of Congress were made to punish an assault or battery committed in any place within their exclusive jurisdiction, and an indictment were to state the fact to have been committed, and alledge that it was done against the act in such case made and provided, it would certainly be held sufficient in any court of criminal judicature in the United States.

In examining the various articles of accusation, I will consume no more of your valuable time than the intrinsic importance of the subject absolutely requires. I am not standing in an ordinary court of justice. I do

Digitized by Google

not consider myself arguing a case before an honest, but perhaps an unlettered jury. I feel myself addressing an enlightened tribunal, composed of venerable and illustrious characters, who add to the native virtue of integrity, that intelligence and knowledge which is acquired by the study and experience of years. I am sensible that I am addressing those more capable of communicating information to me than I am of instructing them.

The case of poor Fries, embraced by the first article, presents a melancholy picture, of which I must solicit you, painful as the object may be, to take a view. From this gloomy spectacle you would naturally desire to avert your eyes, and I could wish for the honor of human nature that it had never been exhibited. But your duty compels you to contemplate it, whilst mine commands me to pourtray it.

In justice to my early acquaintance (Mr. Hopkinson) who defended the respondent against this charge, I must observe, that the task assigned him was performed with great ability and address. But my learned friend (Mr. Nicholson) in reply to his observations, presented such a clear exposition of the facts, and such a sound commentary on the law applicable to this article, that I am sensible he must have removed the great mountain of objections which overshadowed for a time this part of the case. My share of duty is therefore considerably diminished. It only remains for me to add a brick or two to the wall which he has erected, and to answer some of the remarks of the learned attorney general of Maryland, and his eloquent colleagues, Mr. Harper and Mr. Key.

On questions of fact I shall rely principally on the admissions contained in the answer, and shall not detain this court with adverting to the volume of evidence which has been taken, unless where the respondent has thought proper to deny any material part of a charge. I believe his own answer confesses substantially the truth and correctness of the principal facts on which the articles rest. This court will require no stronger evidence I presume, than the admissions of the party, deliber-

Digitized by Google

ately recorded by himself. When he denies facts, it is his duty to support such denial by the necessary proofs. But taking the answer altogether, though a masterly performance in point of style and language, in my humble opinion, it gives a death wound to his case.

It appears that Fries had been tried in the year 1799, before judges Iredell and Peters, and convicted of the crime of high treason. His counsel afterwards moved for a new trial, on the ground that one of the jury had been prejudiced against him. That he had not in fact been an impartial juror in the case. The court, consisting of the same judges, upon argument, ordered a new trial to be had. A new trial, according to the best authorities, is "*a rehearing of the cause before another* "*jury, but with as little prejudice to either party as* "*if it had never been heard before.*" In this light judge Chase should have considered it. He ought to have gone to Pennsylvania with a mind totally unprejudiced, and viewed every circumstance of the case with the utmost impartiality. The very circumstance which produced the second trial ought to have put him sufficiently on his guard. When a new trial had been directed, to use the language of the respondent in his answer, "*solely on the ground that one of the jury*" (a single man out of twelve) "*after he was summoned, but be-*"*fore he was sworn on the trial, had made some de-*"*clarations unfavorable to the prisoner,*" how ought an impartial judge to have felt and to have acted? Mr. Chase, let it be recollected, presided in a court composed of but two members. With this lesson before his eyes, we find the respondent forming an opinion in his closet on the law of treason, applicable to the case of poor Fries, and not satisfied with making up his own mind on this subject, he took care to bind the judgment of his associate, by obtaining his approbation of that opinion which he reduced to writing for the purpose. This irregular and reprehensible measure was adopted before the hour of trial arrived, when the man whose life was at stake, was to be heard on a subject that involved his existence. This bold step in the path to conviction, has been defended on plausible grounds and by subtle

Digitized by Google

refinements. The respondent in his answer, and the learned counsel in their defence have endeavored to prove that this conduct was not only right, but perfectly proper and correct. Among the various pretexts eagerly laid hold of to justify this novel procedure, they urge as a reason for prejudging and dispatching a capital case, the multiplicity of civil business pending in the same court! I will forbear to enquire into the facts on this point, though I believe there is not a spark of testimony to prove the allegation to its full extent, because, if the docket had been loaded with civil suits, it would form no excuse for hurrying through a criminal trial, on the issue of which the life of a fellow citizen depended. That cause must be bad indeed that requires to be propt by such miserable expedients. When I first read this passage in the answer, it struck me with astonishment, and excited a burst of indignation which it is my duty to repress. "A multitude of civil "business is depending, and therefore I must make up "my mind conclusively on the law in a capital case, "before the proper season arrives, without hearing "a single word from the prisoner or his counsel in de-"fence!" The learned judge certainly did not reflect on the effect of such an excuse, which instead of palliating his conduct, aggravates it. That he was in a great hurry, every part of his conduct proves. From the opinion, a copy of which is annexed to his answer, it would appear that he did not intend to make it public, at least until after the jury had been sworn and Fries was on his trial. In that we find these expressions:

"The court heard the indictment read on the ar-"raignment of the prisoner some days past, *and just* "*now on his trial*, and they attended to the overt acts "stated in the indictment."

This honorable court will recollect that the whole current of the testimony proves, and the defendant in his answer admits, that he delivered the papers containing this *ex parte* opinion before Fries's trial commenced. Such was his eagerness to dispatch the case, with a view, he says, of reaching expeditiously the civil list. As if gifted with the spirit of intuition and with an in-

Digitized by Google

fallible judgment, he seems not to have proceeded *on* the principle of *castigatque auditque*, but to have improved even upon that model, considering it not necessary for him to hear arguments at any stage of a cause, for the purpose of forming a correct opinion. His counsel ask us whether it be a fault in a judge to have a profound knowledge of the law, which will enable him to decide promptly any question that may occur; and the respondent said on Fries's trial, that "he had "an opinion in point of law as to every case which "could be brought before the court, or else he was not "fit to sit there." Yet, when Callender's trial was progressing, we find this same judge, upon a common point of practice relative to a challenge to the jury, calling out for Coke on Lyttleton to be brought into court before he could make up his mind on the subject.

Sir, I hope always to see more of profound *legal* erudition and extensive information on the bench. A rational diffidence in their own opinions is the result and the companion of knowledge. Characters of this description, who combine integrity and impartiality, qualities essential for a judge, with their learning, will never form and deliver an extra-judicial opinion. They will adopt the maxim, *audi alteram partem*, in their practice. If judges act correctly and properly in deciding the law in a single case, without hearing both sides, the principle will hold good in all cases. Every issue of pure, unmixed law ought to be thus decided. Demurrers, special verdicts and motions in arrest of judgment, instead of being determined in open court on solemn argument, should be decided by the judges in their closets. Cases in error, removed up to the higher tribunal for the purpose of correcting the mistakes of inferior jurisdictions, would of course be adjudged without argument. The court would only have to meet to deliver the opinions in public, which they had formed in their chambers. Surely when gentlemen contend it was correct in the respondent in a criminal case, when law was blended with fact, and the life of the accused involved in the issue, they must advocate in civil causes, where from the nature of the pleadings,

Digitized by Google

the fact is separated from the law, the practice of their own principle. I agree it would save time and some expence in obtaining decisions, but would causes be decided as justly and satisfactorily?

I have before stated and endeavored to prove by the letter and spirit of the constitution, that in all criminal cases the jury have an established right to decide the law as well as the fact. The respondent, whose actions do not always correspond with his declarations, in the charge delivered before they retired from the bar, to the jury who convicted Fries, uses the following language:

"But the jury are to decide in the present, and in all "*criminal cases, both the law and the fact.*"

It cannot therefore be necessary for me to repeat the same answer to the maxim that has been suggested, *ad questiones facti respondent juratores, ad quæstiones legis respondent judices*, which Lord chief justice Vaughan, on a memorable occasion, gave to the counsel of his day: a very good maxim, but often very improperly applied. It is referable to these cases solely when the law and fact by the pleadings are separated, as in the case of demurrers and special verdicts. It has not the most remote application to criminal cases, on the issue of not guilty, which necessarily blends law and fact together. A pure, unmixed question of law never came before a jury, it is always mingled with fact, and must depend upon the testimony. In such a case the judge cannot give any positive directions of law on the trial; for the law can only arise out of facts, and the judge cannot know what the facts are are until the jury have given their verdict. Lord Hale, a great authority in criminal law, also observes, that "it is the "conscience of the jury that must pronounce a prison-"er guilty or not guilty; for to say the truth, it were "the most unhappy case that could be to the judge, if "he at his peril must take upon him the guilt or inno-"cence of the prisoner, unhappy also for the prisoner; "for if the judge's opinion must rule the verdict, the "trial by jury would be useless." I think I tread on ground which can neither be removed or shaken, when I assert the unqualified right of the jury in Fries's trial

Digitized by Google

to decide the law equally with the fact, because added to all the rest, I have the respondent's own authority in support of the position.

Suppose then that judge Chase had not been so eager and in such great haste to display the offspring of his profound legal reflections. That he had been patient enough to wait as he originally designed, as appears in his answer, "*until after the petit jury should have been impannelled and heard the indictment read to them by the clerk*," and the jury, "*before the district attorney should have stated to them the law on the overt acts alledged in the indictment as it appeared to him*," had presented a set of papers to the court and the counsel on each side, containing their decided opinions of the law, that the overt acts stated in the indictment did not amount to treason agreeably to the constitution. That they would not have this law controverted, nor suffer any cases of construction in the British statutes to be cited. I presume the learned judge would scarcely have brooked such conduct in the jury, though the case is parallel with his own. He declares himself that the jury had a right to decide the law in that cause, and they would only have done what he himself did do, decided it without argument, having made up their minds at home, after hearing the indictment read on the prisoner's arraignment. Had the jury adopted this conduct, which I fear the judge could not have tolerated, and had they persisted in it, the prisoner must have been acquitted against the predetermined opinion of the court. Sir, notwithstanding the observation of Mr. Harper, that the court refused to grant a new trial in criminal cases in favor of life from motives of humanity, and not because they have not the power if they choose to exercise it, I must beg leave most explicitly to deny this position. The court possess no such authority, nor have they ever attempted it in a single case within my recollection, and certainly the learned counsel produced no example of the kind. Besides, the defendant states in his answer, that "*he well knows that it is the right of juries in criminal cases, to give a verdict of acquittal which cannot be set aside on account of its being contrary to law.*" To bring the case home

Digitized by Google

to the business and bosom of the respondent, let us suppose that when he first appeared before this honorable court, surrounded by the able and eminent counsel which the laws and humanity afford him, you, Mr. President, had presented to his advocates a paper containing the predetermined opinion of a constitutional majority of the Senate, that if the facts contained in the articles of impeachment were substantiated by proof, that the respondent was guilty in law of high crimes and misdemeanors, for which he ought to be removed from office, and disqualified to hold any other under the United States, would he not have said, and with great justice too, that you had prejudged his case? The refined distinctions so eloquently urged to excuse his own conduct, would have vanished the moment the reality was experienced. The splendor of his sophisms, which have sometimes almost dazzled our eyes, would have been obscured by his own feelings. The instant the case was made his own, his conduct would have furnished us with all the evidence and all the arguments that would have been required. Had this court acted in such a manner, it would have given the respondent a volume of explanation on the subject of *prejudging the law*, which one of his counsel (Mr. Hopkinson) has stated he does not understand.

But, thank Heaven, this dignified tribunal has treated the respondent with that indulgence which is due to individuals in his situation. They have given him the full benefit of our equal laws. They have acted upon the humane and benevolent principles of our code, which presumes every man innocent until he is proved to be guilty. The laboring oar is on our side, and unless we satisfy the Senate by plenary evidence, of his guilt, they must and will, I trust, acquit him.

The examples of lord chief justice Eyre and of judge Iredell, in the charges which they have delivered to grand juries, have been referred to, for the purpose of shielding the respondent. The cases are utterly dissimilar, and bear no analogy or resemblance to each other. Their charges contain a general definition or description of those offences which come under the

Digitized by Google

cognizance of a grand inquest. When they deviate from peculiar circumstances to particular cases, the opinions they express are always subject to correction, for whoever heard of a judge refusing to permit the counsel for an accused individual to controvert any doctrines delivered in his charge to a grand jury? This was not the conduct of lord chief justice Eyre or judge Iredell. Whatever sentiments they may have expressed in their charges, they were open to conviction, and permitted the counsel to indulge themselves in all the latitude of argument which they considered necessary to their client's defence. Would to God, that the respondent had imitated the examples which his own counsel have held up to our view!

As the learned judge had formed this ex-parte opinion, to which he was determined to adhere, his advocates make a merit of his revealing it at the period he did, and they inform us that he might have kept it locked up in his own bosom, of which he alone possessed the key, and have divulged it when it was too late to counteract it. But the express purpose of opening the budget, was to prevent counsel from controverting the points. For the defendant in his answer expressly says, "*The "court held itself bound by the former decisions, and "would not therefore alter its opinions in consequence "of any arguments.*" Without this precious confession, we well know the effect of bias on the human mind. Such is its peculiar mechanism and constitution, that when an opinion is once formed on any subject, it is extremely difficult to correct it, though erroneous. When once, therefore, the judgment was rivetted against the prisoner, before the season of exertion in his behalf comes round, the tongues of angels would have been insufficient for the task of changing it.

The aid of precedent has been called in to justify this wide departure from principle, and it is contended that the opinion was correct in point of law. My honorable friend (Mr. Randolph) has detected and exposed the fallacy of this species of justification. I will remark that a great and respectable character (Lord Mansfield) has observed, that he is a most unrighteous

Digitized by Google

and wicked judge who decides without hearing both sides, even when he decides correctly—Because his judgment is the effect of chance or accident, and not the result of a fair, full and impartial investigation. Precedents, let me observe, do not make the law, they are merely evidence of it. Nor is the law to be absolutely decided by precedents; *judicandum est legibus, non exemplis.* "If a judge conceives that a judgment "given by a former court is erroneous, he ought not "in conscience to give the like judgment, he being "sworn to judge according to law," says lord chief justice Vaughan. But judge Chase declares, that had he differed in opinion from former precedents, even in a capital case, he should have held himself bound by them. But here let me ask what are those precedents to which he subscribes? It is not my intention to go at full length into the discussion of them, or comment at large on the law of treason. My object is, on this interesting occasion, to enter a solemn protest against doctrines which would entail on us all the constructive treasons of another country, and to assign in a few words the reasons of my opinion. I am not to be deterred from my duty by the assertion that no counsel of eminence would controvert the correctness of the principles laid down by the respondent in his ex-parte opinion, more especially when characters of such high standing at the bar, as Mr. Lewis and Mr. Dallas, have honorably and conscientiously opposed such monstrous doctrines. The western insurrection in Pennsylvania was materially different from the momentary disturbance in the counties of Bucks and Northampton. The precedents which arose from one could not be applicable to the other, and the cases of Mitchell and Vigol, which have been cited, are readily distinguished from that of Fries.

In the first, the combination was formed and organized to seize *all* records and papers, and to destroy *all* offices, to expel *all* officers in the whole survey. The insurgents traversed the country armed, seized papers, attacked offices, and drove officers out of the country.

They seized and imprisoned the marshal, who escaped and returned to Philadelphia by a circuitous route.

Digitized by Google

They assembled at Cooche's fort, consulted on the attack upon col. Neville's house, marched thither in military array, summoned him to surrender by a ki set fire to his house, and destroyed his records. The assembled at Braddock's field; deliberated on takin the garrison at Pittsburgh; marched thither with that avowed object; but finding the garrison prepared for defence, they filed off.

They assembled after the proclamation, and after the militia were ordered to march. They avowed an intention to resist. They compelled the government to negociate. The leaders, Bradford and Marshal, fled on the approach of the army, and the insurgents generally accepted the terms of amnesty, as in a case of treason. The army was however maintained for some time in the country.

In the last, the people were illiterate, ignorant of the laws and language. They did not conspire to act themselves, but to prevent *particular* inferior officers from acting, by making the assessments in *particular* townships.

They acted like a mob, in obstructing the progress of the officers by threats, hooting, &c. and once they took an officer's tax list or papers, but immediately returned them.

They assembled expressly to release or rescue a *particular* set of prisoners, whom they called their neighbors.

They rescued the prisoners, and withdrew without injuring or attempting to injure the marshal, or the tax officers who were with him at Bethlehem.

They never suggested the idea of resisting the army. They dispersed as soon as the proclamation was issued; and they never met afterwards.

The distinctions are striking and obvious.

In the insurrection of 1794, the object was general—in the riot of 1799, it was particular.

In 1794, the insurgents *acted* as assailants:—the rioters of 1799 stood on the defensive, and only obstructed the officers in attempting to act.

In 1794, the design of attacking a fort and resisting the army was deliberately formed, and overt acts com-

Digitized by Google

mitted to carry it into effect; in 1799, the idea of attacking or resisting the military power of the government never was suggested.

In 1794, the sedition act had not provided for combinations to impede the execution of a particular law:—in 1799 that act was in existence.

In 1794, the outrage extended to a seizure of the marshal to prevent his executing any process:—in 1799 it was confined to the release of a particular set of friends and neighbors.

The precedents, therefore, of Mitchell and Vigol, which have been so much relied upon, did not, I humbly submit, apply to the case of poor Fries. But the defendant has dwelt much on the opinion expressed by judge Iredell in his charge to the petit jury on the former trial of Fries, notwithstanding the verdict was set aside, which was given on that occasion, and judge Chase should have proceeded in the second trial, as little prejudiced by any opinions on the former, as if such trial had never taken place. It appears from the testimony of Mr. Dallas, that so confident was he of the broad difference between the cases of 1794 and 1799, that in the first trial he did not advert to the former, little suspecting that they would be considered as precedents for the latter. When he found by the charge of judge Iredell that he did unexpectedly rely upon them, his intention was in the second trial to direct his arguments to the manifest distinctions between them. In this, however, he was disappointed by the arbitrary conduct of the defendant. Under these circumstances, can this case be considered binding and obligatory, or is a single precedent to make the law, and absolutely prevent counsel from controverting it.

The learned judge bolsters up his opinion by stating, that it is in conformity to the uniform opinion of British judges since the revolution of 1688. But these judges were bound by all the precedents which had previously occurred. And is every baneful exotic to be thus transplanted into our soil? If they are, I trust, however they may flourish in their native land, they will wither and die in our clime. The constitution de-

Digitized by Google

fines treason, and to that instrument alone we should look for a complete description of the crime. Those illustrious characters who formed it, no doubt supposed they gained a great point in thus ascertaining with precision the offence. The president Montesquieu justly observes, for the crime of high treason to be indeterminate or uncertain, is of itself sufficient to make any government despotic. The text of our constitution is sufficiently plain without any British glossary. Let me earnestly recommend on this point, without reading them myself, the perusal of the observations of a learned and excellent judge, (Mr. Tucker) the pure ermine of whose character is not sullied by a single stain, contained in his edition of Blackstone's Commentaries. On this American stock shall we engraft every scion which we can procure from the luxuriant *upas* of England? No, sir; I trust there will be found independent judges, who will prune away such unnatural branches, and restore the original purity to the constitution.

The court will indulge me at this stage, with a few observations in reply to the authority from Kelynge, cited by one of the counsel (Mr. Hopkinson) and which I had nearly omitted. They must have been extremely pressed when they had recourse to this case, where the judges, the attorney general and the solicitor general for the crown met together in conclave, to decide the fate of those accused of treason. Need I remind this intelligent Senate, that this shameful transaction, this gross prostitution of justice, took place before the revolution, and just after the restoration of Charles II. when pliant judges were selected to bring to punishment the innocent as well as the guilty. The island of Great Britain was at that period a common slaughter house. Such was the savage thirst of the government for blood, that they persecuted persons who had fled to the remotest parts of the earth. Is it not surprising that conduct pursued, at a time when proscription was the order of the day, should be produced to justify the respondent? It proves vastly too much. It evinces that if precedents in evil times are to be implicitly followed, there

Digitized by Google

is no offence however great, no conduct however flagrant, which may not be sanctioned and supported. But, sir, to produce a case which happened before the revolution of 1688 to excuse the conduct of a judge who refused to hear authorities read prior to that period, is, I must confess, a singular incident in this trial. Independent of the consideration that the court themselves had thus predetermined the case of the unfortunate Fries, what must have been the effect on the minds of the jury summoned on the pannel, who were present when this ex parte and extra judicial opinion was published to them and to the world? The agitation produced at the bar has been described by the witnesses in such a manner, that you are capable of contemplating the sum, and of estimating the fatal effects, which it must have necessarily produced in the case of the prisoner.

I contend, therefore, from the respondent's confession, and the testimony, that he is guilty of the first specification contained in this article; that he unfairly and in violation of the plainest rule of duty, prejudged the case of Fries, without any reasonable excuse, much less justification for so doing.

Not contented with prejudging the cause and prejudicing the minds of the jury who were to try the issue, he proceeded still further, with adventurous strides on untrodden ground. Apprehensive that a single ray of argument would dispel the mist which he had raised, he determines that the counsel assigned by the court themselves shall not controvert before the jury the opinion delivered in writing. They were directed to address themselves to the court, who would not, if we believe judge Chase himself, in his answer, alter their opinion on the subject. And yet the respondent admits the undoubted right of the jury to decide both law and fact.

It appears from the history we have received of the case, that the counsel for Fries knowing that the attorney for the United States would rely on cases decided in England since the revolution, wished to trace them to their origin. It is a fact which will not be disputed

Digitized by Google

even by the respondent, that since the revolution the British judges have held themselves bound by the authority of cases previously decided. Sensible then that the determinations which resulted from the sanguinary precedents which the rude decisions of barbarous ages had established, would be urged against their client, the counsel for Fries desired to go to the fountain head, to expose the poisonous source from which such streams flowed. Is there any member of this court who can for a moment hesitate to pronounce their conduct correct on this point? Judge Iredell, whose example has been quoted on the former trial, permitted it to be done.

The advocates of Fries wished also to draw arguments in favor of the defence from some of the acts of Congress, particularly from the *sedition law*, as it is commonly called. Mark the objection of the respondent. "Treason is defined in the constitution. We can pay "no respect to the opinion of the representatives of the "people of the United States on this subject. We will "not hear them. Much time was wasted on the former "trial by citing and commenting on the statutes of con-"gress." The opinions however of three or four British judges are entitled to great weight and consideration. Judges who never read or heard of our constitution, but who paid the debt of nature before it existed. But the deliberate opinion of both Houses of Congress, and the President of the United States, evidenced by a solemn legislative act defining and punishing the very offence, in my humble opinion, which Fries had committed, was not to weigh a feather in the scale. It might reasonably be supposed, that the acts of Congress, though not received as authoritative and decisive of the question, would be respected, and no person could have imagined, that counsel were not to be permitted to read them. The legislative body contained at that time characters well versed in constitutional lore. The sentiments of men, however well acquainted with the provisions of the constitution, as a matter of study and of duty, were not to be expressed before a jury sworn to decide law and fact, for the purpose of informing

Digitized by Google

their consciences on legal topics. I will not detain you, by citing cases to prove, that acts of the legislature have been frequently received to assist the judgment even when deciding on a constitutional question. An able and upright statesman (Mr. Madison) has declared at an early period of the government, "that as to *a* "*doubtful part of the constitution, an exposition may* "*come with as much propriety from the legislature as* "*any other department of government.*" The wisdom of judges has not always been thought so paramount to that of legislators, that they would not even hear their opinions. But then Fries was before the court, it was perfectly irrelevant and highly improper to refer to an authority so inconsistent with the closet opinion of the court. I have generally understood, in the course of the little experience I have had in courts of justice that opinions given without argument are never to be relied on, and I question whether any counsel in any court of justice, except where the respondent presided, would think of producing as authority, the singular document, prepared in his chamber, in a case which he had never heard argued. His able defenders assert (in the very face of his own declaration, that his opinion could not be changed by any arguments) that the respondent was willing to hear the counsel for Fries. Such is the testimony of a witness, Mr. E. Tilghman, whose candor and impartiality are beyond the reach of suspicion, and to whom I give the most implicit credit. The learned judge did observe that "*nevertheless counsel should be heard.*" Considering that he was resolutely determined never to change his written opinion, one would suppose, he might have agreed that they should range as widely as they pleased through the field of argument, and could have safely permitted them to talk until they were satisfied. This however, was not the fact. They were to be heard in his own way and on his own terms. His memorable expressions in relation to the cases which the counsel for the accused wished to cite, and to apply, must be recollected by this court. *What! cases from Rome, Turkey, or France!* In this emphatic manner did he persevere in preventing any recurrence to the

Digitized by Google

rotten foundation on which the authority, that the learned judge considered as conclusive, was built. Was this imitating the conduct of Lord Chief Baron Eyre? Let any gentleman peruse the trials of the honest Hardy, the upright Tooke, and independent Thelwall, and he will be struck with the difference of conduct. Throughout those trials the court leaned to the side of the prisoners, as if, in the benevolent language of the law, they really were counsel for the accused. They manifested a becoming indulgence to the celebrated characters concerned for them, and when Mr. Erskine, that distinguished ornament of the bar, who is not more justly admired for his shining talents than his inflexible unblemished integrity, by some animated observations which proceeded from the warmth natural in an honest cause, excited the feelings of the Solicitor General, the President of the Court complimented him for the zeal and ability which he displayed in the cause of his clients. Messrs. Lewis and Dallas both declare expressly that the respondent said they must address themselves to the court and not to the jury. I acknowledge that neither Mr. Tilghman nor Mr. Rawle, for whose characters I feel the greatest respect, recollect this particular fact, but surely this cannot operate against the positive testimony of two witnesses; for though there may be an apparent contradiction to a superficial observer, there is no real difference between them. On the subject of positive and negative testimony, let me refer this court to what has already happened in the course of this very trial, where the advocates on both sides are attentively taking notes of every thing which is said. The gentleman who closed the defence (Mr. Harper) mentioned, that one of the managers had stated, that an impeachment was merely an inquest of office. I believe there is not a manager who recollects that such an observation was made, (unless it may be the gentleman who made it) and yet there is not one of us who does not believe that it was actually made. It is precisely the same case, with respect to the testimony of Messrs. Dallas and Lewis. There cannot be any exception taken on this point to their evidence, merely because the other wit-

Digitized by Google

nesses have not the fact impressed on their recollections. Let me observe further that Messrs. Dallas and Lewis particularly state that Judge Chase absolutely declared that the acts of Congress should not be read; the same remarks which have just been made will apply to Messrs. Tilghman and Rawle's not recollecting that fact. By the constitution every accused individual is entitled to the benefit of being heard by counsel. If the court will not permit the jury to hear, or the counsel to speak any language which they do not approve, they deprive the accused at one and the same time of the right of trial by jury, and of the privilege of being heard by counsel. The learned judge states that the jury have an undoubted right to decide both law and fact, but in the same breath declares that he is to be the exclusive judge of what is law. This really reminds me of the story of the sailor in the play of the Tempest, who agreed that his comrade should be the viceroy over the island, provided he were viceroy over him. As it relates to the counsel you may as effectually deprive a prisoner of this benefit, by preventing their speaking on the points which they conceive material to the defence, or by a rude course of overbearing, insulting conduct, toward them, which will totally disqualify them for the task, as if you were to nail their lips or clap a padlock on their mouths. Such was the conduct pursued by the respondent in Fries's case, that I hesitate not, to pronounce him, on the strength of the facts, guilty of depriving the unfortunate prisoner of the benefit of counsel, and the jury of their constitutional right. I do not contend that counsel should be permitted to read on a trial any thing they please, an idle tale, a novel, or a farce totally irrelevant to the issue, but I assert and maintain their undoubted right in the case of Fries, to read and comment at large before the jury on the statutes of Congress, and on those old precedents, from which the modern ones sprang, like shoots from a parent stock, which they earnestly wished and desired.

When deprived of their constitutional privileges, they would not degrade the independent character of the profession, by becoming the servile instruments of the

Digitized by Google

court. They disdained going through the mockery of a trial, that their client might be hung according to form, and they retired with indignation from a tribunal which had reduced them to this distressing alternative. For this laudable conduct the Attorney General of Maryland has been pleased to say, they ought to have been instantly committed to prison. What, Sir! Send counsel to jail for insisting on their constitutional right to address the jury at large on the law in a criminal case, and on a trial for high treason, and for withdrawing when compelled by conduct unequalled in the annals of jurisprudence to abandon the cause of their client and suffer professional ignominy and disgrace. So far am I from subscribing to this extraordinary opinion, that I think the gentlemen who defended Fries deserved a civic garland, or a laurel wreath for their manly firmness and dignified independence. I was sorry, Sir, to hear from the lips of a learned and respectable witness (Judge Winchester) that in Maryland it is the uniform practice *in criminal cases* to take the judgment of the court on points of law, and that although counsel seriously differed from them in opinion, it would be thought a high breach of professional decorum to attempt to controvert the point before the jury. When, however, I put a case of gross and palpable error in the opinion of the court, on a trial for a capital offence, and asked the witness whether he would not then argue the case before the jury, that able and humane judge replied that such a case would justify a departure from the ordinary course. Yet even in Maryland the court do not, I understand, decide the point until it is legally brought before them, and fully discussed. When the respondent therefore in the case of Fries determined without hearing any argument, and before the season of trial arrived, he should have recollected the memorable example recorded in holy writ. Even Omniscience would not condemn Adam without hearing him. "Adam where art thou."

And shall man,
"Proud man,
"Dress'd up in a little brief authority,
"Play such fantastic tricks before high heaven, as
"Make the Angels weep."

Digitized by Google

We find the respondent after he had thus completely stripped Fries of the panoply, with which the constitution and the laws of his country had cloathed him, informing the disconsolate prisoner, almost in the very words of the execrable Jeffries to the unfortunate Sydney, that "the court would be his counsel, and by the blessing "of God, would serve him as effectually as his counsel "would have done!" Gracious heaven! what must have been the deplorable situation of the accused, and what the emotions of his mind, at that awful moment? Before a jury prejudiced by the court themselves, deprived of their rights, without counsel and without friends, standing on the verge of eternity. His senses must have sickened at the scene, and expiring hope reclined upon the tomb. But I will not attempt to pourtray it, my feeble powers and weak language lag far behind nature. I should do injustice to the subject, which you can better feel than I can describe. On your feelings therefore I must draw for the deficiency of expression. It is truly singular that the respondent should rely on the circumstance of Fries's counsel retiring from the case, as a ground favorable to the present defence. This is taking advantage of his own wrong, because it so happened (for the ways of the Deity are inscrutable to the human eye and intellect) that his illegal and unjustifiable conduct rescued Fries from the grave, after he had consigned him to an ignominious tomb, and released the poor victim which he had bound to the altar. Yes, there was an overruling Providence who watched over the life of the prisoner; there was, to use the language of the eloquent Curran, "a redeeming spirit in "the constitution, which walked with the sufferer "through the flames of the prosecution, and rescued "him unhurt from the conflagration" The shameful occurrences on the trial of Fries reached the ears of the late President Adams. Through the then Attorney General of the United States, he requested from the counsel for the prisoners, a statement of the grounds on which they intended to rely had they been permitted to defend him. These were candidly and concisely, but with great clearness and perspicuity unfolded, and Mr.

Digitized by Google

Adams rising superior to the passions of the day and the folly of the times, with a firmness and humanity which did him infinite honor, stretched the arm of mercy to the devoted victim of party. Sir, I will venture to affirm, notwithstanding the confident manner in which it has been asserted, that the respondent's prejudicate opinion on the law of treason in the case of Fries was correct, that in questioning that opinion I have the authority of Mr. Adams in my favor, evidenced by an official act, of which I feel it would be impossible for me to speak in terms of panegyric too lofty. As I cannot add to the eulogium of my honorable friend Mr. Randolph, I will not by any feebleness of expression take from it. Is the respondent entitled to any share of the merit of this great and good action? Did he intercede at the seat of mercy? And yet because the life of Fries was saved by the justice and humanity of Mr. Adams, his counsel would almost persuade us, that Mr. Chase had this object in view, when he adopted the conduct which he exhibited on the trial. He deprived him of an impartial trial by jury, the adamantine chain which secures the life of a fellow citizen, and suspended his existence on the slender hair of executive discretion, and his counsel make a merit of the deed!

Taking the conduct of the respondent altogether, in that unfortunate case, which will be remembered as long as virtue is revered or vice deplored, it exhibits a stupendous colossus of judicial despotism and *legal* injustice, which standing with one foot fixed on the rights of juries and the other placed on the privileges of the accused, bestrode the prostrate constitution and laws of the land, and with a look more fatal than that of the basilisk, threatened to destroy the liberties of our country.

The case of Fries was succeeded by that of Callender. There is seldom one act of crying injustice, without being followed by another. It is the misfortune if not the fault of the respondent that his conduct compels us to unfold more than one solitary case, in which he grossly violated his duty and the laws of the land.

Digitized by Google

Callender had written a book, which I never saw until since the commencement of this trial. A wretched performance which ought never to have excited in the breasts of the honest supporters of the late administration any passion but contempt. They should have applied to it the memorable declaration of one who once figured in political life, "a wise and virtuous administration is not to be battered down by mere paper shot." The respondent it appears was furnished by one of his present counsel, (Mr. Martin) when in the act of setting off for the district of Virginia, with a copy of this formidable work, which threatened destruction in his opinion to the federal fabrick. The book was ready scored to his hands, so that with a single glance he might discover the fatal passages. With this volume for a "*vade mecum*, or travelling companion," he proceeded to Richmond to hold a circuit court. Soon after his arrival a presentment was made and an indictment found against Callender. The miserable object of persecution was hunted up and down the country. At length he was discovered by the Marshal and brought into court. To the indictment he pleaded not guilty, and able and eminent counsel appeared to defend him. To avoid any dispute about testimony in discussing this case, I shall rely implicitly on the evidence of their own witness, Mr. Robertson. The case of Callender is comprised by the second, third, fourth and fifth articles, which specify the particular acts that were committed in violation of the law and of his duty as a judge. I shall advert to the prominent grounds of charge in the order in which they occurred on the trial, without confining myself to the order in which they are stated in the articles.

Callender not being prepared with the testimony necessary to substantiate his defence, an affidavit was filed in due form, which stated ample grounds to postpone the trial of the cause, and upon which the court ought certainly to have granted a continuance. One of the counsel for the respondent has read a rule of the supreme court, which declares that they will consider the practice of the King's Bench as forming the outline for

Digitized by Google

them. In the authority which I produced a few days ago, the general doctrine on the subject of postponing trials is laid down in a clear and plain manner. In the case of the King *vs* D'Eon, the court of King's Bench state very accurately the rule adopted for the postponement of a cause. It is only necessary to state in the affidavit that a material witness is absent, whom you have used your diligence to obtain, without the benefit of whose testimony you cannot safely proceed to trial, and that you expect to procure his future attendance. The affidavit of Callender stated the absence of witnesses whom he believed material, mentioned their names and places of residence, and the facts which he expected to prove by them. This was at the very term when the indictment was found. What are the objections raised against the motion to postpone, founded on this affidavit, and the reasons urged in support of the respondent's refusal to put off the trial? They are truly singular. One is a refined technical objection to the form of the affidavit, because it does not state in strict legal language that Callender expected to be able to procure at a future time the attendance of the witnesses. But he states facts which prove on the face of them, that by postponing the trial he could obtain the benefit of their testimony, for he mentions the places of their residence, all of them within the United States. I say the case is stronger than if, *secundum formam*, he had sworn that he could procure their attendance. When he tells where they lived, the court must have been satisfied on this point. However the respondent assigns a curious reason, to be sure, for his conduct. If the witnesses who were absent were actually before the court, and were to prove all that Callender had stated or expected, it would not have justified all the libellous passages that had been selected from the book and thrown into the indictment. How was Judge Chase to know but that Callender had testimony as to those points on which his absent witnesses would not have deposed. I have ever understood it to be a sufficient ground of postponement, if a witness be absent who can prove any one material fact in a cause, and I never yet heard of a

Digitized by Google

court after being satisfied of this, attempting to ascertain whether there were other witnesses who would prove all the rest of the facts necessary to substantiate a defence. This would be most effectually trying and deciding a cause upon a motion which was intended to prevent the trial of it at that time. It is further contended that any person who writes on political subjects should have all the documents, vouchers and witnesses at his elbow to prove the truth of any fact which he asserted. I have always thought, that when a charge is preferred against any man, it is time enough then to look for testimony to prove his innocence. In fact there is no method which I know of by which he could procure the evidence of any individual until there was a case depending. All the exparte affidavits he could obtain, this honorable court know would be incompetent testimony.

The respondent it seems was willing to postpone it for a particular period, provided he would be present at the trial. Nay, he would go all the way to Delaware, and return again to accomplish an object he seems to have had so much at heart. In my humble opinion this part of the Judge's conduct proves stronger than almost any other of his acts, the motives which influenced him. If I were to select any one circumstance to prove that his intentions were improper, I would lay my hand on this. I will not postpone this important trial until the next term, because according to the arrangement, I shall not then be on this bench, but I will agree to delay it for a shorter period, and travel three or four hundred miles in order to accommodate Mr. Callender with my presence on the trial. Did any lawyer ever hear of such conduct? Did they ever hear of a court adjourning to a particular time, to try a single solitary case of a common misdemeanor?

I read a case the other day from Bacon, where the trial of an indictment was postponed until the second term from that in which the motion was made. I referred to another case in Cowper's Reports, where the court declared they would postpone the cause for ever, as the witnesses were not within the power of the de-

Digitized by Google

fendant, unless the prosecutor would agree that their depositions should be taken and read as evidence.

Let us suppose that Callender had stated in his affidavit that he could not procure the attendance of material witnesses, because the process of the court would not reach them, and that the respondent himself had been of opinion that their testimony could not be taken by commission, the court possessing no such authority in a criminal cause. Ought he not under these circumstances to have imitated the humane example of a British judge, and to have told the District Attorney that he would postpone the cause until he consented that their depositions should be taken. He preferred acting in a very different way. As some of the witnesses were not within the power of the court, no matter how material their testimony might be to the defence, it was an argument sufficient in his own mind to order on the trial of the cause, more especially as the affidavit did not state, what was never before required, that he had other witnesses ready to prove the residue of his case, provided he could procure the evidence of those that were then absent, which was absolutely necessary, fully and completely to substantiate his defence. I take up this case and test the conduct of the respondent by the facts which at that time appeared before him, and not by any subsequent declarations of the counsel for Callender. Was there any legal cause of suspicion in the case, arising from any circumstances which have been related? The wretched author of a vulgar, miserable performance, had been presented, arrested and indicted, and was about to be tried off hand, as if in a court of pie poudre, where business is dispatched as quick as you can shake the dust from your shoes, when his counsel exhibited an affidavit of the absence of material witnesses, and moved the court to postpone his trial according to the usual course. And though strong legal grounds are laid before them, this reasonable request is refused upon the miserable pretexts which have been assigned. Dispatch appears to have been a favorite object with the respondent in criminal business. But this extempore mode of proceeding, this impromptu method of administering

Digitized by Google

justice, when an accused individual is praying for time to collect the testimony necessary for his defence, is in perfect hostility with the humane spirit of our laws, and the practice of every court with which I am acquainted. I have read as a maxim of law, that in capital cases no delay is long, and I should presume, that in crimes of an inferior grade, a reasonable postponement, as the object cannot be to convict and punish innocence, ought certainly to be granted, and is enjoined in all the authorities, let us turn our eyes to whatever book of practice or precedent we may. I am far from thinking that there may not be such glaring violations of the law by those who are presumed to be best acquainted with it, as at first blush to prove that they were intentional, and proceeded from impure motives, not from ignorance, but design.

Suppose a judge should sentence any person to the pillory for an offence which was by law punishable with a small fine, or condemn him to the whipping post for a crime, the penalty annexed to which was imprisonment. I presume in either case there would be no question about motives. I put these merely for examples, because I take it, whenever there is an unequivocal, glaring and manifest violation of any known principle, or settled rule of justice, with which a man well educated in the legal science, and more especially one who possesses the *viginti annorum lucubrationes*, cannot be unacquainted, no doubt can arise whether he acted from honest mistake, or evil design. The case which was cited on this point by one of the counsel, (Mr. Key) from Term Reports, does not apply on this occasion. That was an application to the court of King's Bench for an information, which is a more summary mode of proceeding, than by indictment, and in such cases it is the practice of that court, unless very strong grounds are laid before them, not to interpose their extraordinary power of granting an information, which deprives the accused party of the security and protection of a grand jury, and will compel the applicant to resort to the ordinary remedy of indictment.

Digitized by Google

I do respectfully submit for the reasons assigned, that the conduct of the learned judge, in refusing to postpone the trial of Callender, was a most manifest violation of all the principles of law, and was attended with such circumstances as render it highly improbable that it proceeded from a mere error in judgment.

Let us examine the subsequent conduct of the respondent. And whilst we view him progressing with the case, we shall find him at every step deviating more widely from the course which he ought to have pursued.

It is in evidence, that a person (Mr. Basset) was called to the book to be sworn as a juror, who suggested to the court facts, which in my humble opinion, rendered him incompetent for that office. This suggestion was made from laudable motives. It proceeded from a conviction that he was not an impartial juror, whose mind had received impressions unfavorable to the case of the accused. He candidly stated to the court that he had seen in the newspapers extracts, said to be taken from the work called the "Prospect Before Us," and that if the extracts were truly taken, he had formed an unequivocal opinion, that the book was a libellous publication, for he had made up his mind that the sedition law, as it is called in common parlance, was perfectly constitutional. This very work was the foundation of the indictment, which we may reasonably suppose contained, if not all the passages which had been scored by that profound lawyer the Attorney General of Maryland, a judicious selection of those that were most obnoxious and offensive. I undertake to state as a correct principle of law, that upon an indictment for a libel, though particular sentences may have been culled by the prosecutor, the jury have a right to examine the whole publication, and to judge from the general context of the book, whether the publication be criminal or not. This was universally allowed, even when the powerful talents and commanding influence of a Mansfield had effected a monstrous innovation in the trial by jury, in cases of this nature. When like the defendant, (but recollect not in a capital case as on the trial of Fries) he had reduced

Digitized by Google

the jury to mere cyphers, and had usurped their powers, and arrogated for the court the right to decide what it was the duty and the province of the jury to determine. The poor jury were to be confined to the mere fact of publication, and the truth of the *innuendoes*, and the court were to decide exclusively the law.

It was reserved for that great and enlightened statesman, Mr. Fox, to restore the law to its ancient uniformity, and revest in the jury that power in prosecutions for libels, which they possessed in every other criminal case. It will be remembered that in this arduous and laudable undertaking, he was supported by the eloquent Erskine, and the venerable Earl of Camden, who had resisted with that independence and integrity, which strongly marked his dignified character, the new fangled doctrines of the court of King's Bench. Since the libel bill has been enacted, in all the cases which have occurred, the subject has been left at large with the jury. I recollect particularly on the trial of the King *vs* Stockdale, which took place soon after, Lord Kenyon told the jury they were not tied down to the passages selected from the pamphlet, but were to compare the extracts with the whole publication, and judge for themselves from the entire work, as to the guilt or innocence of the accused, and Stockdale was acquitted. If a juror had formed an unequivocal opinion, that the work entitled the "Prospect Before Us" was a libellous publication, he had in fact formed an unequivocal opinion on an indictment predicated on extracts, taken from that book. There is no logic which can destroy or evade this position, drawn from the facts. Observe the subtlety, with which the respondent eludes the most obvious principles. The question put by him to the juror was, "have you ever formed and delivered an opinion "on the charges contained in the indictment?" Remember that the indictment was not read to him, in order that he might know what it contained, and having understood its contents, be able to give a correct answer, he was called upon to declare whether he had formed and delivered an opinion on what he had never seen, nor heard read, and with sophistry exposed to

Digitized by Google

vulgar inspection, the learned judge proceeds to state, that "he never saw the indictment nor heard it read, "and if he had neither read, nor heard the charges, he "was sure he could not form an opinion on the sub-"ject." But how unjust was the conclusion which the respondent drew from his premises. For the indictment which Mr. Basset never heard read, when he came to read it, might be found to contain those very passages, which he considered as libellous, and how in the face of the fact, for the juror had decided "The Prospect Before Us" to be a libel, and the "Prospect Before Us" judge Chase knew himself to be the sole basis of the indictment. Let us suppose that the respondent himself, after scanning with eagle eyes this terrible publication, had absolutely made up his mind that it was libellous, and had afterwards been called upon as a juror, on an indictment against Callender, which he had never seen or heard read, but which in fact was founded on this publication. Would he pretend to say, because he did not know what the indictment contained, that it was impossible he should have formed an unequivocal opinion on the charges which composed it? I presume not. Behold then the imposition which was practised upon a juror, who had made up his mind absolutely on the very question to be tried. He might as well have asked him whether he had formed and delivered an opinion on any other indictment, of which he had never heard before, as one which he had never read, and of the contents of which he was utterly ignorant. To have asked Mr. Basset whether he had formed and delivered an opinion on any particular case in the books with which he was entirely unacquainted, and if he answered from that circumstance in the negative, to have ordered him to be sworn, would have been just as proper as the course the judge pursued. Mr. Basset had formed an unequivocal opinion, that the publication for which Callender was indicted was a libel. And had delivered this opinion to bring it completely within the respondent's rule. Some of the counsel have observed, that the objection was not made by the advocates of Callender, and that it proceeded from a mere suggestion of Mr. Basset. And

Digitized by Google

which is the strongest case? I apprehend that where a juror, conscious of his impressions, from motives of delicacy, puts the court in possession of information, on which they were bound to act. Let me ask under these circumstances, whether Mr. Basset was an impartial juror? And does not the imperative language of the constitution declare, "*that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.*" With this plain provision on my side, I want not the glossary furnished by the authorities which have been cited by the counsel for the respondent. Nor can it be necessary to enter into a critical examination of them, as we have a case determined in our own courts, on the motion for a new trial, made on behalf of Fries. On that occasion, this honorable court will find, that all the precedents relied upon at this time were adduced and urged. The passages from Brooke, Roll, Viner, and trials *per pais*, were cited. The law at large and the law abridged, were brought before the judges, who decided after a solemn argument in favor of a new trial. This single case is sufficient to overturn the authorities, in which the respondent's counsel appear to repose such implicit faith. What were the facts on the motion for a new trial in Fries's case? After a verdict of guilty, an affidavit was made that one of the jurors had said that Fries ought to be hung. Mr. Basset, this court will recollect, in effect declared as positively that Callender ought to be convicted. Mr. Basset had formed an unequivocal opinion, that the publication for which Callender was indicted, was a libel. This opinion to bring it completely within the respondent's rule, he delivered in open court at the moment of being sworn as a juror. That certainly was giving an opinion that Callender ought to be punished. But the juror in Fries's case, when confronted with the witnesses who deposed to his declaration, denied having made use of the expressions imputed to him.

I do therefore most sincerely believe, that the respondent decided against the principles of law and the plain letter and spirit of the constitution, when he directed

Digitized by Google

Mr. Basset to be qualified as a juror on the trial of Callender. He decided also against the just construction of his own rule, contained in the question which he addressed to the juror, and gave it an interpretation, which rendered it equally ridiculous and absurd. The question must have presupposed the juror acquainted with the contents of the indictment, and must have been predicated on this principle. Any other supposition would render it not merely idle and nugatory to be put, but truly nonsensical; and yet the respondent made his being ignorant of the charges in the indictment, the pretext for swearing him on the jury. So far as relates to the delivery of an opinion which he had previously formed, Mr. Basset, in answer to an interrogatory which was put to him by me, replied, that he did publicly in open court pronounce the opinion which he had formed of "The Prospect Before Us," from the extracts which he had seen in the papers. Here then is proof that he did deliver in the most solemn and public manner an opinion on the subject, from which, on his oath as a juror, for he was just about to be qualified, he could not depart without subjecting himself to ignominy and the severest reproach.

The point is, I humbly conceive, too plain to require any further comments, and I shall proceed to another extraordinary circumstance, which occurred on this trial, which I am sorry to say was characterized by so many and such strange modes of proceeding, that I think we might safely challenge the profoundest researcher in the judicial history of England to furnish a parallel. Let me remark, that all the questions proposed to the witnesses on the part of the prosecution, were put *ore tenus*. The tongue and not the pen propounded them. As soon as the examination began on the part of the defendant, or to speak more correctly, before it commenced, the tables were turned, and the counsel of Callender were directed to reduce to writing the questions which they wished to ask. This is proved to be a novelty in trials of this nature. If so, was it an innocent novelty? Why embarrass the counsel for the prisoner with an unusual and unprecedented regulation,

Digitized by Google

and compel them to do that, which they did not require on the part of the prosecution. This extraordinary measure has been attempted to be excused, because, this honorable court has adopted, though partially, the same rule upon the request of any of its members. The large number of judges, of which this dignified tribunal is composed, rendered such a rule necessary and proper. It flowed from the very nature and constitution of this court, and is agreeable to constant and general usage. The two cases bear no resemblance nor similarity to each other. The rule operates here equally and fairly, let the question come from what quarter it may, whether from the managers or the counsel, or whether it be proposed by any member of this honorable body. The counsel for Callender submitted to this new law of the court, promulgated at the instant it was to be executed, and suited to the case before them. They reduce the questions which they wished to ask Colonel Taylor, to writing. Immediately an objection is raised against them. And if it were not already known to this honorable court, I am sure no member could guess what it was. The respondent had first enquired of them what they intended to prove by the witness, and then insisted that their interrogatories should be committed to writing. It will be recollected that from the miserable trash of Callender, the prosecutor had picked and culled here and there, the most noxious and loathsome passages. Every offensive paragraph constituted a separate and distinct charge. The charges were of course numerous. The following sentence was selected as the ground of two of them. Alluding to the late President Adams, the publication says, "*He was a professed aris-* "*tocrat. He had proved faithful and serviceable to* "*the British interest.*" The passage itself contained two distinct assertions, both of which had been charged with the proper *innuendoes*, to explain the intentions of the author, and the tendency of the expressions as highly criminal in the indictment. The district attorney, it appears from the note taken by Mr. Robinson of his argument, considered the term aristocrat, used in the common political or party acceptation, with the views of

Digitized by Google

Callender as particularly offensive and libellous. Contrary to the precipitate opinion of the respondent, he considered the assertion that Mr. Adams was a professed aristocrat, a substantive offence of itself. Colonel Taylor's testimony it was expected would go to prove the truth and justice of those observations of Callender's. It often happens that counsel are not accurately informed of all that a witness can depose. From the questions drawn up in haste by Mr. Hay, to be put to Mr. Taylor, the respondent drew the inference, but in my humble opinion, very erroneously, that Colonel Taylor's testimony would not go the whole length of substantiating the facts necessary to evince that Mr. Adams was a professed aristocrat, and that he was faithful and serviceable to the British interest. He thought it could only prove part, and therefore rejected it as inadmissable. For this opinion, Mr. Robinson states, that the judge declared that "he took the responsibility on himself, and risked his character on it." His reasons were neither solid nor plausible. He stated that the passage constituted an entire charge, and every part of it must be proven, or none at all. If a person had a respectable witness as to part, and another equally respectable as to the residue, he would examine neither, because singly taken, their testimony would not go to all the charge. It is seldom, indeed, any party can make out his whole case by one solitary witness, and when it does happen, it is always suspicious. When an individual is selected to prove all that is required, agreeably to the rule of the respondent, no objection of this kind would occur. But is not that case much stronger where a number of witnesses appear, each ready to depose to the particular facts within his knowledge, and where the sum or aggregate of their testimony furnished a complete answer to the charges, however numerous.

I may safely venture to say, that in the annals of any courts of justice or injustice under heaven, such an exception to testimony is not to be found. The chief justice of the United States, a gentleman every way well qualified to judge, declares that he never heard of such an objection before. It is without precedent, and in

Digitized by Google

violation of every rule of the law of evidence. The idea is too absurd to be dwelt upon. It is too distorted in principle to admit of consistency in practice. It is contraband in law, and can only be smuggled by the address with which it was introduced. It requires great talents and ingenuity for a moment to hide its deformity, and in vulgar hands it would become truly ridiculous and contemptible. It is utterly indefensible; and the respondent's counsel themselves have felt it incapable of being justified. They have attempted to excuse it, by endeavoring to shew that the learned judge was not influenced by bad motives. For my part I consider it so flagrant, that I can ascribe his conduct to no other, especially when taken in connection with the facts and circumstances proved by the evidence. This will lead me to make a few remarks on the *quo animo*, with which he acted throughout the whole of this transaction. On this topic the evidence is copious and pointed. We have been charged with destroying the confidence of society, because we have given evidence of the declarations of the respondent made to Mr. Mason. These have been stated with all that delicacy which is characteristic of the gentleman. I do not discover from the manner or the circumstances, that the respondent's conversation with Mr. Mason was a confidential one. If I did, I will candidly acknowledge I should feel little disposed to trespass on the walks of private life. It was said to have taken place at an unguarded moment, and that every unreserved expression should not be tortured into an accusation. Let us bear in mind that the respondent was a judge of the land, and about to depart to Virginia, to perform the duties attached to his office. He had then in his possession a copy of Callender's work, and declared he would teach the people of Virginia to distinguish between the liberty and the licentiousness of the press, and that if the state was not too much depraved to furnish a jury of good and respectable men, he would certainly punish Callender. If we pursue him on his way to Richmond, we find him in the stage asking a perfect stranger, whether he had ever seen "The Prospect Before Us," and expressing a wish

Digitized by Google

that Callender had been hanged. He actually proceeded to Richmond with the scored book in his pocket, which was delivered to the jury, and Callender was convicted and punished. It is said by his counsel, that these declarations of the respondent's were not made in earnest, they were mere jests. I suspect Callender did not find them so. Like the fable of the frogs, it might have been jest and sport to judge Chase, but it was cruelty to him. Sir, I will not dwell longer on those unpleasant and painful circumstances. This honorable court can and will duly appreciate them. Much more might be said on this case, but I will leave the task to abler hands than mine. My honorable friend will do ample justice to those points which I have omitted.

From Virginia, flushed with success and elated with his triumph over Callender, the respondent hastened to Delaware. The night preceding the day on which the respondent was to hold the court, he lodged at the village of Christiana, about five miles distant from the court house. From this place he rode into New Castle next morning, with Dr. William M'Mechen, who was summoned as a grand juror to the court, and it is in evidence, was actually sworn on the pannel. This is the very man, who, it is represented, gave the respondent the information relative to the seditious printer. As a grand juror it was his duty to communicate to his fellows, any offences against the laws of the land, which had come to his knowledge, and it was the duty of the grand jury to present every criminal act, punishable by the laws of the United States. We are bound to pronounce that Mr. M'Mechen put the rest of the grand jury, for he was sworn so to do, in complete possession of all the information which he communicated to the respondent. With these circumstances, the respondent was perfectly well acquainted. He saw with his own eyes the very man impannelled on the inquest who had opened the budget to him, and knew it was his duty to unfold the intelligence to his brethren. The respondent proceeds to deliver an appropriate charge to the jury. A charge free from all those blemishes which stain a subsequent performance of the same kind. He presented to

Digitized by Google

their view in chaste and eloquent language, the proper subjects for their enquiry. In my humble opinion it may have been equalled but never excelled. I considered it, according to my poor judgment at the time, a perfect model, the most finished piece in style and substance, that I ever heard addressed to a grand jury. Had he stopped here, he would have been an object of praise rather than complaint. Had he been contented with discharging his official duty he would have been entitled to our thanks, rather than merited an accusation. The grand jury retire to their chamber, and after some time return to the box. To the credit of the then marshal of the Delaware district, I must observe, that he had manifested on that occasion, (as I know him uniformly to have done, even when the storm of party raged with the greatest violence) in the selection of his jurors, an independence becoming the responsible station which he filled. They were not men of pliant tempers, nor were they carefully culled from the ruling sect, but chosen without respect to party, from the most respectable of both sides. It gives me great pleasure to speak of such conduct, because I wish to hold it up as an example. The grand jury were asked by the clerk in the usual form, "have you any bills or presentments to "make?" Their foreman respectfully answered "they "had not." On this, the judge could no longer bridle his temper. He had anticipated perhaps a treat from the prosecution of an obnoxious printer, and expected to regale his palate with a favorite dish. Provoked by disappointment, his passion burst into a flame, and he condescended to stoop from the bench, for the purpose of seizing on his prey. It was at this period he betrayed emotions so highly reprehensible, and so very unsuitable to the dignity of his situation. In a tone, well adapted to the exceptionable language, he observed to the grand inquest "What no bills or presentments!" This was matter of astonishment to him, and he proceeded to make the observations so correctly described by Mr. Read, the district attorney of Delaware, a gentleman of irreproachable life and manners, whose character is not only unimpeached but unimpeachable, and

Digitized by Google

Mr. Lea, one of the grand jury themselves, to whom part of the observations were addressed, a merchant of established reputation, and as a man respected by all who are acquainted with him. Sir, after the observations I have already made on positive and negative testimony, I will not stop to demonstrate that every thing stated by Mr. Read and Mr. Lea was said, though not recollected by some other witnesses. I will barely mention that all the extra-judicial remarks of the respondent were addressed to the grand jury or to the district attorney. They must therefore naturally be presumed to have paid the strictest and closest attention to all that fell from the learned judge, and we have produced one of the grand inquest themselves, and the district attorney to prove the language he used. I feel confident under these circumstances, that implicit credit will be given to them. I am also convinced that the statement made by the respondent is scarcely more favorable to his cause. The grand jury repeat to the interrogatory put to them by the respondent, the answer which they gave to the previous question of the clerk, and request additionally that they may be discharged, as many of them were farmers, and it was hay harvest, a very busy season with them. But no matter for that, the business of persecution, for I will not say prosecution, must go on if possible. The judge would not discharge the grand jury on the first day agreeably to general practice, as proved by judge Bedford, though pressed so to do. He proceeds to give them information of the seditious temper which had manifested itself in the state, and particularly in Newcastle county. A county, which suffer me to say, is well known for its old and unshaken patriotism from the revolution to the present day. But he did not stop here, he proceeds to mention a seditious printer, point out the place where he lived, and the borough of Wilmington justly celebrated for its uniform attachment to the cause of republicanism, and according to his own answer, to specify the title of his paper, and just as his name was escaping from his lips, a returning sense of propriety checked his speech. Sensible how deeply he had committed himself already, he paused for reflection.

Digitized by Google

But he had gone too far to effect a safe and honorable retreat. He calls on the district attorney to know if a file of the papers cannot be had. Some officious person offers to procure them, and the respondent directs the district attorney to examine them and lay them before the grand jury, who are ordered to attend the next morning. They do accordingly attend, the file of the papers is laid before them and examined. Behold after all his exertion the respondent had his labor for his pains, after all this noise and bustle *montes parturiunt*, and not even *ridiculus mus nascitur*. The grand jury return once more to the box without any bills or presentments, and the learned judge with admirable address covers his defeat. Such appears to have been his conduct on that memorable occasion. Where is the law or the authority which gives him the power to goad the grand inquest to indict an individual, or vests in him the right to order a district attorney to search for criminality? Is the judge himself authorised to hunt up offenders! Or is he justified in pronouncing a person guilty of sedition before he is charged with the offence? Remember, though he did not mention the name of the printer, he confesses himself that he named his paper, and *id certum est quod certum reddi potest*. Instead of pronouncing sentence of condemnation on a person before he has been accused, the benevolent language of our laws commands the judge to be his counsel when the constituted authority of the country has put him on his trial. If this conduct be not a violation of his duty, if it be not a case of plain and palpable misbehavior, I know not what is.

Mr. Harper. The judge did not undertake to pronounce sentence on his guilt, or innocence. He gave the information as he received it.

Mr. Rodney. I am now arguing from what I consider in evidence, I am speaking from a copy of the deposition of Mr. Read, taken last winter, in which my honorable colleague, Mr. Nicholson, has marked the very expressions used by the witness when he gave his testimony on this trial, and which literally corresponds with his former deposition.

Digitized by Google

The President (Mr. Burr). Proceed, Sir, if it differs in any respect, the court will mark the difference.

[Here Mr. Rodney referred to Mr. Read's deposition, and contended that the respondent gave as matter of information part of what he stated, but as to the residue, he undertook to assert it, and proceeded.] But, sir, if it is all to be considered as matter of information, let the respondent's rule in Callender's case operate upon himself. His language there was, you should have the proof at your elbow for every thing you publish. Do unto others as you would have others do unto you, is a golden rule. He undertakes on the credit of another to inform against an independent citizen, and to bring him before the accusing power of the county, who by their solemn act, with one voice pronounce him innocent. A judge who ought to set an example to the nation, and more especially one who had just returned from punishing a person for communicating to the public information which he had received from others, appears guilty of pronouncing from the bench a libel on the character of a county and of an individual, and contends in the face of his own doctrine there is no guilt or criminality in it. But this predetermination of a case not before him, is in my humble opinion extremely reprehensible. To shew that the respondent is not culpable, a precedent from the state of Pennsylvania is cited. Much as I venerate the character of the then chief justice of that state (Mr. M'Kean) and though I esteem him dear as a man, I should be lost to a sense of gratitude if I did not, I cannot in the case alluded to, subscribe to the precedent which he established. But even that is clearly distinguishable from the one under consideration. Mr. Cobbet, who undoubtedly was a man of extraordinary talents, not merely for invective and abuse, but for the strength, simplicity and originality of his style, however much I may dislike the monstrous principles which he espoused, had been previously bound over for various supposed libels against characters peculiarly the objects of protection, with the laws of this country. This may be considered as an inchoate accusation, and may have

Digitized by Google

led Mr. M'Kean to make the observations which he delivered on that occasion.

Though I do not, Mr. President, perceive my voice fail me, I feel myself so exhausted with standing such a length of time this morning, before the court adjourned for half an hour, and so long since that temporary relaxation, that I find myself unable to continue any longer on my feet.

The court adjourned until the next morning, when Mr. Rodney proceeded as follows:—

Mr. President. Before I resume the discussion of the Delaware charge, I beg leave to return my sincere thanks to this honorable court for the indulgence which they were kind enough to grant me last evening. It is the first and most sacred principle in our criminal code that a man is presumed to be innocent until he is proved to be guilty. The counsel for the respondent have strenuously urged this principle, and wish it to govern the case of their client. I am willing to give him the full benefit of it. But did the judge himself act in conformity to this in Delaware? No. He did undertake to denounce a person guilty of a crime, before he was charged with the commission of any offence. Did he allow an independent printer who would not sacrifice the freedom of his press, on the altar of the Baal, or the mammon of the day, the advantage of those principles which his counsel now claim for him? He did not. He pronounced the absent man guilty without waiting to see or hear him. Upon the mere *say so* of another, he took the risk upon himself, to tell the grand jury there was a printer of libels against the government, when his informant was one of them, and even after they had returned, without any bills or presentments. It manifests a deliberate persistence in accusation, which I will forbear to qualify by the proper terms. The grand jury upon a careful examination of the very documents on which he relied can find nothing libellous, nothing seditious, and the contemplated victim is thus preserved by the integrity and the independence of a jury of his fellow citizens.

Digitized by Google

The conduct of the learned judge at the circuit court in Maryland, furnishes, I consider, one of the strongest articles of impeachment. I had intended to have dilated very much at length on this charge, but the fatigue of yesterday has really indisposed me, and I have already trespassed too much on your time.

Every member of this court must have been sensible of the impropriety of the respondent's conduct on that occasion. Every reflecting man must be decidedly opposed to the idea of blending political discussions, with the legal observations which ought to proceed from the bench. A party harangue little comports with the temperate and learned charges to be delivered by the president of a court. The character of an electioneering partizan, whose rostrum is a stump, or whose stage is the head of a hogshead, is utterly inconsistent and incompatible with that of a grave and upright judge. The duty of a judge is to expound the laws and not to exercise the office of a censor over them, and much less to disgrace himself by reprobating them in a manner calculated to excite groundless alarms and apprehensions in the minds of the people, and to alienate their affections from the government. Every man in his individual capacity possesses the undoubted right to advocate the political principles which he believes most beneficial to his country. The respondent as an individual is entitled to this privilege in common with his fellow citizens, and to the free exercise of his splendid talents in such a cause. But does this justify him as a judge in his judicial character, and from the judgment seat to preach political sermons, and impose his private dogmas on the people under the garb of administering the laws. Sophistry may for a moment confound two things perfectly distinct in their nature and effect, but the mist vanishes before the light of argument.

I most ardently desire that the sanctuary of justice may not be prophaned by the unhallowed spirit of party. The law, like the gospel, should be no respecter of persons, whatever may be their political sentiments. The virtue and integrity of a judge should keep him within the line of his duty, and form an eternal barrier against

Digitized by Google

the encroachments of party prejudices and partialities. If politics are forbidden to enter, or even to approach a court of justice, neither judge nor jurors will feel those sensations which disqualify them for the impartial discharge of their respective duties. Though party may rage with violence and agitate the country, all will be calm and tranquil in a court, in which every man's property, liberty and life, will find a safe harbor. This should be inculcated by lessons and by examples, as a primary principle in our judicial system. I am happy to find that we all agree on this great and essential point. It is the anchor of hope amid those storms and tempests in which it is the will of Providence that all human affairs should sometimes fluctuate. The learned counsel, though they acknowledge the conduct of the respondent to have been imprudent, improper and indiscreet, attempt to justify it by the production of charges which wear a political aspect, delivered during the American revolution. I will enter my protest against those, even at so turbulent a season, but none that have been produced furnish any grounds of defence to the respondent. In no instance which has been cited, have they attempted to exclaim against the very government from which they received their commissions. We behold the defendant, a judge of the United States, passing judgment of condemnation on the laws which he was bound to conform to and to execute, and with the policy of which, in his judicial character, he had nothing to do. Much pains was taken in the examination of the testimony to disprove a fact which the defendant himself admits in his answer; to shew that the respondent did not censure the administration, when he himself has furnished us with a copy of the charge in which he condemns in the strongest manner one of the most prominent acts which have been passed since a change took place in the politics of the country. He reprobates the late law abolishing the judicial establishment made under the late administration. To this law the Senate, who in their executive capacity form a material part of the administration, gave their consent, and the President who is at the head of affairs gave his approbation. And yet gentlemen

Digitized by Google

contend that the respondent uttered not a syllable against the present administration! Is it not a plain, incontrovertible act of misbehavior in a judge to denounce the very law under which he was then exercising his functions, and to hold it up to the people as shaking to the foundation the independence of the national judiciary?

It will be conceded that there yet exist state jealousies against the general government, the acts of which are closely watched and scrutinized. When the constitution of the United States was framed, it was the legitimate offspring of a liberal spirit of accommodation which reconciled jarring interests, *discordia semina rerum*. It requires the patriotic exertion of every good man to preserve and to promote a reciprocal cordiality between the general and state governments. The officers particularly of each should manifest a respect and reverence which would inspire at once confidence and attachment. What language can express the criminality of the respondent, when from the bench of the United States he undertook to thunder anathemas against the acts of the legislature of an individual state? Was this a part of his duty or was it not? Can there be a doubt, sir, but that it was a gross violation of his duty, and that the respondent well knew it at the time. Yet such were his unbridled passions and his uncontrolled prejudices, that regardless of the station which he held, and the dignified post which he occupied, he did not hesitate to commit the character of the United States by conduct which must have irritated the audience against the government of Maryland and its officers. If ever *a mobocracy* take place in this country, it will be brought about by such instruments and such conduct. Let those cloathed with the laws become the violators of them, let the judges of the United States issue fulminations against the measures of individual states, and the judges of the different states retaliate, by declaiming against the acts of the general government, and the consequences are easily foreseen.

When a poor miserable object like Callender, without character and without influence, censures the measures

Digitized by Google

of our administration, or reprobates an unconstitutional law, the respondent considered him guilty of a crime and deserving of punishment. But a man elevated to the bench may declaim in the strongest language against any measure, or law of the United States, or of an individual state with perfect impunity! Recollect, sir, that if the defendant be justified in reprobating a single law of the United States, he has the right to reprobate them all indiscriminately. It is without question the duty of a judge to inculcate a respect and reverence for the laws of the land. But, sir, the respondent, so far as he was able, has endeavored to excite the indignation of the people against them, and to terrify them into an opposition to measures which he has chosen from the bench to denounce, by the dread of *a mobocracy* and other alarming stories unworthy the columns of a common newspaper, and scarcely equalled since the days of the Rye-house, and of Titus Oates.

Mr. President, I have now gone through the several articles of impeachment, and submitted to your consideration the remarks which I had to offer in illustration of the subject. Permit me before I conclude to observe, that in this country no ignominious punishment follows upon a conviction by impeachment. Your sentence cannot extend so far as to hurt a single hair of the respondent's head. In England the power to punish is unlimited, and has been but too often exercised with cruel unrelenting severity. With us it seems intended to restore and to preserve the purity of office rather than to punish the offender by a penalty proportioned to his guilt. Remember, if this honorable court acquit the defendant, they declare in the most solemn manner, and their sentence will be of record, that he has on all the occasions to which I have adverted, behaved himself well, in a manner becoming the character of a judge worthy of his situation. They sanction every act which he has committed, and proclaim them to the world as examples which ought to be followed. Sir, they in effect adopt every part of his conduct and make it their own, thus participating in the actions and transgressions proved against him by the testimony. This is indeed a

Digitized by Google

serious consideration. Are the members of this court prepared by a solemn judgment, which proceeding from a tribunal so elevated, will have a powerful and commanding influence to sanction by their high authority the conduct of the respondent. No, sir, I trust they will embrace the present opportunity of displaying the virtue, the purity, and the energy of our republican government, and that in pronouncing the sentence which they may pass, they will erect a beacon, by which future judges will avoid the rocks on which the respondent now lays ship wrecked.

Sir, I have the fullest confidence, that if in the opinion of the members of this court the respondent be innocent, they will have the independence to acquit him, and I entreat them to do so. On the other hand, if he be guilty, they will have the firmness to convict him.

With a sincere and a fervent hope that the Supreme Ruler of the universe may so govern the decision of this case, that it may punish guilt but protect innocence, I cheerfully submit it to the consideration of this honorable court.

Digitized by Google

WEDNESDAY, FEBRUARY 27, 1805.

MR. RANDOLPH.

MR. PRESIDENT,

After the very long and able, though (as, I fear, it must have proved to this honorable court) tedious discussion of this important subject, it again becomes my duty to address you. That duty springs not only from the authority with which the House of Representatives have been pleased to invest me, but is enforced by the strong and deep interest which I take in the question before you. It is an interest which I am not ashamed to avow. Strange indeed would be the mechanism of my composition, could I stand indifferent to the fate of this impeachment;—if the success of a prosecution instituted at my own motion, of an indictment drawn by my own hand, and backed by the strongest body of evidence that, perhaps, was ever adduced in support of any accusation, should fail to interest me. My first wish, indeed, would have been to find this great culprit innocent of the charges which have been preferred against him—But since, by the clearest testimony, and even by his own admission, we are denied this gratification, all that remains for us is to see that signal justice done upon him, which the constitution demands for offenders of his high rank, and which we confidently expect from your decision.

The course which has been pursued by my learned colleagues and right excellent friends leaves but a barren field in which to glean after them. I shall therefore present you with the most condensed view that I can take of the subject, endeavoring, as far as possible, to avoid the ground which has been already trodden; and should I fail in this attempt, I hope to be pardoned, as having been absent during a great part of this discussion. Very far indeed is it from my intention, by tiresome repetitions, yet more to weary the patience of the court, and prolong that decision which is anxiously awaited by all. I was not present when the defence was opened,

Digitized by Google

in a style so honorable to himself, by the junior counsel of the respondent. (Mr. Hopkinson). I was then ill a-bed. I regret the loss of the very able argument, which he is said to have urged against the first article. God forbid! that the time shall ever come with me, when merit shall be disparaged because found in an adversary. Report speaks fairly of the gentleman's performance, and I am willing to credit her to the utmost extent.

Suffer me to say a few words on the general doctrine of impeachment, on which the wildest opinions have been advanced—unsupported by the constitution, inconsistent with reason, and at war with each other. It has been contended, that an offence, to be impeachable, must be indictable. For what, then, (I pray you) was it, that this provision of impeachment found its way into the constitution? Could it not have said, at once, that any civil officer of the United States, convicted on an indictment, should *(ipso facto)* be removed from office? This would be coming at the thing by a short and obvious way. If the constitution did not contemplate a distinction between an impeachable and an indictable offence, whence this cumbrous and expensive process, which has cost us so much labor, and so much anxiety to the nation? Whence this idle parade, this wanton waste of time and treasure, when the ready intervention of a court and jury alone was wanting to rectify the evil? In addition to the instances adduced by my right worthy friend (Mr. Nicholson) who first addressed the court yesterday, permit me to cite a few others, by way of illustration. The President of the United States has a qualified negative on all bills passed by the two houses of Congress, that he may arrest the passage of a law framed in a moment of legislative delirium. Let us suppose it exercised, indiscriminately, on every act presented for his acceptance. This surely would be an abuse of his constitutional power, richly deserving impeachment; and yet no man will pretend to say it is an indictable offence. The President is authorised, by the constitution, to retain any bill presented for his approbation, not exceeding ten days, Sundays excepted, with-

Digitized by Google

in which period he may return it to the House wherein it originated, stating his reasons for disapproving it.—Now let us suppose, that, at a session, like the present, which must necessarily terminate on the third of March, (and that day falls this year on a Sunday,) the President should keep back, until the last hour of an expiring congress, every bill offered to him for signature during the ten preceding days, (and these are always the greater part of the laws passed at any session of the legislature) and should then return them, stating his objections, whether good, or bad, is altogether immaterial. It is true, a vote of two thirds of each branch may enact a law in despite of executive opposition; but, in the case I have stated, it would be physically impossible for congress to exercise its constitutional power;—indeed, over the bills presented to the President within *nine* days preceding its dissolution, the legislature might be deprived of even the shadow of control, since the executive is not bound to make any return of them whatever. Now, I ask, whether such misconduct in the President be an indictable offence? and yet is there a man that hears me, who will deny that it would be a flagrant abuse, *under pretence of exercise*, of his constitutional authority, for which he ought to be impeached, removed, and disqualified? Sir, this doctrine, that impeachable and indictable are convertible terms, is almost too absurd for argument. Nothing but the high authority by which it is urged, and the dignified theatre where it is advanced, could induce me to treat it seriously. Strip it of technical jargon, and what is it, but a monstrous pretension that the officers of government,—so long as they steer clear of your penal statutes—*so long as they keep without the letter of the law*—may, to the whole length of the tether of the constitution, abuse that power, which they are bound to exercise *with a sound discretion, and under a high responsibility, for the general good?* The counsel who closed the defence, (Mr. Harper) felt that this ground trembled beneath his feet; and, fearing to be swallowed up in the yawning ruin, he precipitately abandoned it. He shifts from the position taken by his associates, and lays down this principle:—"that although

Digitized by Google

an offence, to be impeachable, need not be indictable, yet it must have been committed against some known law." Well! take the question in this point of view, and there is no longer matter of dispute between us :—it is reduced to a miserable quibble. For what do we contend?—that the respondent hath contravened the known law of the land and of his duty, which required him "to dispense justice, faithfully, and impartially, and without respect to persons." He stands charged with having sinned against this law and against his sacred oath, by acting, in his judicial capacity, unfaithfully, partially, and *with* respect to persons. These are our points. We do charge him with misdemeanor in office. We aver that he hath *demeaned himself amiss;* —partially, unfaithfully, unjustly, corruptly. This is the sum and substance of our accusation, and this we have established by undeniable proof. I will waste no more time in attempting to dislodge our opponents from a position which they have abandoned in the face of day. I will no longer worry the good sense of this honorable court, by combatting the claim set up, by the adverse counsel, in behalf of the civil officers of this government, to make their own passions and caprices, personal and political, the rule of that action which should be governed by a sound discretion, and exercised under a high responsibility;—to oppress to the last extent of the letter of the law, and set at defiance an abused and insulted people.

The defence, on the first article, has been so much at variance with itself, the counsel opposed to us have replied so satisfactorily to each other, that the labor of combatting their respective positions is materially lessened. Whilst the honorable attorney-general of Maryland has almost exhausted his ingenuity to prove that the crime charged in the first article was no offence at all,—that the judge did not, in that instance, exceed the bounds of his judicial authority;—the gentleman who closed the argument on that side has confessed the offence, in its full extent; but, in extenuation, avers that it was committted by a man of contrite heart.—

Digitized by Google

Mr. Harper rose and said that he did not mean to make that admission.—He was proceeding, when the President reminded him that he must not interrupt the honorable manager; that if he conceived any facts to be mistated, he might make a note of them, and have them corrected after the argument was gone through.

Mr. Randolph.—The words to which I refer, I took down at the time they were uttered by the respondent's counsel: "the papers were withdrawn; the prisoner's "counsel were entreated to go on, until the cup of hu- "miliation was drained to the very dregs." I took these words down at the moment. They must still ring in the ears of this honorable court. To it I appeal for the fidelity of my statement. Did not the counsel declare, that whilst on every other point his client invoked your justice, on this he implored your mercy? But mercy is not among the dispensations of this honorable court. You will mete unto him that which his defenders tell you he hath measured unto others—justice—to use their own language, "*sheer*" justice; all that he is entitled to at your hands. If the course pursued by the respondent, in delivering a written, prejudged opinion in the case of Fries, was (as the attorney-general of Maryland has contended) warranted by law, wherefore the recantation on the next day? Was the court ignorant of the extent of its own authority; or was it willing to surrender to the bar, laboring too, under its high displeasure, its undeniable and just privileges? Is there any thing in the character of the respondent, which will warrant either conclusion? Mr. President, through every stage of this transaction you perceive every symptom of guilt;—trepidation, remorse, and self-abasement. Look at the consultation at Rawle's, who was followed home by the judges as soon as the court rose. Recollect the conversation which ensued, and the conduct of the court on the following day, when the respondent is said to have atoned for his misbehavior: although, in the same breath, you are told there was no offence to expiate. Do you recognize in that procedure an honorable and manly acknowledgment of unintentional error, which, from a sense of jus-

Digitized by Google

tice, the respondent was anxious to rectify? or do you behold the sullen perverseness of guilt, half ashamed to confess its offences, yet trembling at their consequences? —now soothing, now threatening its adversary; every characteristic of conscious crime? Sir, I blush for the picture which the gentleman has drawn of his client; and I ask you, Mr. President, if such a character is fit to preside in a court of justice? a man whose violent temper and arbitrary disposition perpetually drives him into acts of tyranny and usurpation, from which, when vigorously opposed, he must disgracefully recede;—equally ready to take an untenable position, or meanly to abandon it. To-day, haughty, violent, imperious; to-morrow, humble, penitent, and submissive; prostrating the dignity of his awful function at the feet of an advocate, over whom, but the day before, he had attempted to domineer. Is this a character to dispense law and justice to this nation? No, Sir! It demands men of far different stamp—firm indeed, but temperate —mild, though unyielding,—neither a blustering bravo, nor a timid poltroon. I speak not of private character: with it I have nothing to do. It is the official conduct, only, that concerns me. I have no hesitation in saying that such men are not fit to preside in your judiciary; and that the greatest abilities, when joined to such tempers, serve but still more to disqualify their possessors.

I must here reiterate my regret at losing the argument of the gentleman who opened the defence. I understand him to have said, (speaking of Fries) "could that man be 'innocent,' who had been twice convicted of treason? could he be 'illiterate,' who pretended to expound the constitution? could he be 'friendless,' who had arrayed his numerous followers in opposition to the laws of his country?" Sir, this is a verypretty specimen of antithesis; but unfortunately, for itself it proves too much, whilst, as to the question before the court, it proves nothing. Does the gentleman believe the London mob in 1780 to have been among the most influential men in England? or, because their discontents grew out of religion, that they were more deeply read in canon law than any other body of men in that king-

Digitized by Google

dom? They far surpassed the Northampton rioters in depth and intricacy of research. They undertook to expound the constitution of the church of England. But unfortunately for this gentleman, the guilt, or innocence, of his honorable client is in no wise affected by the guilt, or innocence, of this poor German and his comrades. The respondent stands charged with a departure from the principles of the constitution and the established forms of law, in conducting the trial which was to ascertain the guilt, or innocence of John Fries. What has this to do with his character?—How does that affect the question? Guilty or innocent, he was entitled to a fair and impartial trial according to the known usage and forms of law!—for be it remembered, in such cases, *form* is *substance*. It is the denial of this sacred right, which the constitution equally secures to the most hardened offender, as to persecuted virtue,—this daring outrage on the free principles of our criminal jurisprudence, that constitutes the respondent's crime. If Fries was innocent, what language can sufficiently reprobate the conduct of the judge? An innocent man, by his procurement, iniquitously consigned to an ignominious death.—If guilty, he ought to have expiated that guilt upon a gibbet. But what was the fact? The President of the United States, in consequence of the arbitrary and unprecedented conduct of the court, was, in a manner, *compelled* to pardon him. —The public mind would never have brooked the execution of any man, thus tried and thus condemned. By the misdemeanor of the respondent, then, to rescue the administration of justice from the foulest imputation, to make some atonement to the offended majesty of the constitution, the executive was reduced to the necessity of turning loose upon his country, again to sow the seeds of disaffection and revolt, a man represented by the adverse counsel to be every way desperate and daring,—a traitor and a rebel. Upon what other principle, sir, can you account for the President's application to the prisoner's counsel, and his subsequent pardon? I repeat, Mr. President, that it is wholly immaterial to the question before you, whether John Fries was, or

Digitized by Google

was not a traitor.—Either alternative is fatal to the respondent. He is charged with oppression and injustice on the trial, and you have not only the clearest testimony of the fact, but it is in proof before you that such was the President's motive in issuing the pardon. He must have believed that the sentence was in itself unjust—(which serves but to aggravate the respondent's guilt)—or he must have acted (as, I am willing to concede, he appears to have done) on the ground that, however deserving of punishment, the prisoner had been unfairly tried and his condemnation illegally obtained. Whichsoever of these positions be *true*, the defence set up on behalf of the respondent is *false*. What have you seen? A man condemned to death, unheard, by a prejudiced jury and unrighteous judge, thirsting for his blood;—the executive demanding to hear that defence, to which the court would not listen, and extending the arm of its protection to snatch the victim from the oppressor's grasp.—And will you now turn this man loose upon society, armed with the terrors of the law and secure in impunity, to perpetrate similar offences? Let it not be said that the court dealt out justice and the President dispensed mercy—each in their own province. To extend mercy to the convict, where was the necessity of an application to his counsel for that defence, which the court had over-ruled? It must have been from a conviction that justice had not been done the prisoner by the court, that this application was made. I defy the utmost ingenuity of man to refer it to any other probable, or plausible motive. The conduct of the prisoner's counsel merits an abler eulogium than I can pretend to give—it is above my feeble praise—but my gratitude shall never cease to flow for their firm, vigorous and manly stand against an imperious domineering judge,—for their resolute assertion of American rights against a proud and cruel oppressor. The attorney general of Maryland (whose wit and ingenuity I shall be the last man to deny) has indeed said, that he wishes a lawyer's hand may never be polluted with any thing more corrupt than a prejudged opinion;—and I for my part, most fervently hope

Digitized by Google

that the hand of an advocate may ever thus instinctively shrink from the touch of judicial corruption. "My hand shall never be tainted by receiving a prejudged opinion in any case—much less in a capital one." The man, who uttered those words, needs no other monument, or epitaph. He gave a lesson, of which the judge might have profited—that in discharging his professional duty he was not to be swayed by political antipathies or predilections;—he disdained to become a weak and wicked instrument to sanction premeditated, legalized murder;—he scorned to assist in a miserable mummery of law and justice, a man who could invoke the blessing of God at the moment when he was perpetrating a judicial murder. Had the counsel been seduced, or terrified into submission, this enormity (like many others) would have been shrouded under the mantle of form and precedent.

The precedents which are relied upon to justify the respondent in the trials of Fries and Callender, and the law which is adduced by his counsel on the powers and rights of courts and juries, respectively, relate to *civil* cases, where the law and the fact being always separate and distinct, the first falls under the dominion of the judge, whilst the last only becomes the province of the jury. But in a criminal prosecution the verdict embraces both law and fact, of which being necessarily compounded, so much of the law as is combined with the fact upon which they are to pronounce, it belongs to the jury, and to the jury alone to decide and determine. They are inseparably connected: and therefore the powers of a jury in a common law-suit, between man and man, is no measure of their rights in a criminal prosecution. Thus, in a civil action, the court possesses the power of granting a new trial on the motion of either party; whilst in a criminal case it can exercise this power only in favor of one of those parties (the prisoner:) it cannot grant a new trial to the prosecutor, if a verdict is found in favor of the accused. It is a final acquittal. That the scope of action, in the court, is minished, whilst in the jury it is enlarged, in a cr nal case, is notorious—'tis not a subject of argu

Digitized by Google

But our opponents have not only resorted to the practice in civil cases, which here is totally inapplicable, but they have brought forward English precedents before the revolution, and decisions of the court of *Star Chamber!* Precedents drawn from the worst periods of their history, from hard, unconstitutional times,—decisions from the most flagitious tribunals, whose very name has passed into a proverb of corrupt, unfeeling tyranny. For an account of this Star Chamber I would refer you to John, Lord Somers, of whom it has been said, not with more elegance than justice, that "like a chapel in a palace, he alone remained unpolluted, whilst all around was profanation and uproar."

"We had a privy council in England," (says this great constitutional lawyer) "with great and mixed "powers; *we suffered under it long and much:* All the "rolls of parliament are full of complaints and re-"medies; but none of them effectual till Charles the "first's time. *The Star Chamber was but a spawn* "*of our council:* and was called so, only because it sat "in the usual council chamber. It was set up as a for-"mal court, in the 3d year of Henry VIII. *in very soft* "*words*, "to punish great riots, to restrain offenders "too big for ordinary justice—or, in modern phrase, "to preserve the peace." "*But in a little time it* "*made the nation tremble.* The privy council came "at last *to make laws by proclamation, and the Star* "*Chamber ruined those that would not obey.* At last "they fell together." ("Hatsell's Precedents, vol. 4. "page 65. Note.") Is this the court whose adjudications are to justify the decisions of an American tribunal in the nineteenth century? And in a case of *treason* too? Is this vile and detestable tribunal, (whose decisions, even in England, are scarce suffered to be drawn into precedent) to furnish rules of conduct for the courts of this great confederate republic? Yes, sir, you have not only been obliged to listen to Star Chamber doctrines, but you have been referred to the authority of one most arbitrary magistrate, to justify the oppressions of another. I allude to chief justice Keeling. Who he

Digitized by Google

was, may be seen in the same volume of Hatsell, page 113.

"On the 16th of October, 1667, the House being "informed, "That there have been some *innovations* "*of late in trials of men for their lives and deaths;*" [the very offence charged upon the respondent;] "and "in some particular cases restraints have been put up- "on juries, in the enquiries"—this matter is referred "to a committee. On the 18th of November, this "committee are impowered to receive information a- "gainst the Lord Chief Justice Keeling, for any other "*misdemeanors* besides those concerning juries. And "on the 11th of December, 1667, this committee re- "port several resolutions against the Lord Chief Jus- "tice Keeling, of *illegal and arbitrary proceedings in* "*his office.*" The first of these resolutions is: "That "the proceedings of the Lord Chief Justice, in the ca- "ses now reported, are *innovations in the trial of men* "*for their lives and liberties:* and that he hath used an "*arbitrary* and *illegal power*, which is of dangerous "consequence to the lives and liberties of the people of "England, and *tends to the introducing of an arbitra-* "*ry government.*" (The respondent's own case.) The second resolution is, "that *in the place* of *judi-* "*cature*"—(how does this bear upon the eighth arti- cle?) "the Lord Chief Justice hath undervalued, vili- "fied and contemned Magna Charta, the great pre- "server of our lives, freedom and property." And the authority of this infamous judge, the minion of Charles II.—of judges in the most corrupt period of English history, from the restoration of that king to the revolution, is relied upon by his counsel to absolve the respondent from guilt. Permit me to do their client more justice. I do believe that the man who is held up here as a revolutionary patriot of 1776, although in a moment of human infirmity he hath imitated their crimes, would blush to be justified by their example. For his sake I rejoice in that visitation of God which hath saved him this last degradation: from see- ing his defence rested upon the authority of those infa- mous times, and yet more infamous men, with whom,

Digitized by Google

with all his weaknesses and all his infirmities upon him, he would yet (I am persuaded) disdain a comparison. Yes, I do feel relieved that he hath been spared the disgraceful spectacle of beholding himself defended by his friends on principles more unjust and iniquitous, if possible, than have ever been imputed to him by his enemies: that he hath not been reduced to see those very decisions, prior to the revolution, cited in his defence, which he himself denied to a fellow creature put in jeopardy of life! The benefit of these decisions (it seems) can be taken only by the powerful oppressor—They offer no shelter to his victim. I thank God, sir, that I have indeed studied at the feet of far different Gamaliels from the honorable attorney general of Maryland, or those by whom, it would appear, he has been brought up; that I have drawn my notions of justice and constitutional law from a far different source—not from the tribunals of Harry VIII. nor the tools and parasites of the house of Stuart, but from the principles, the history and the lives of those illustrious patriots and their disciples, who brought the Star Chamber to ruin, and its abettors to the block.

But I cannot consider the able attorney general of Maryland quite sincere in the doctrine which he has advanced. He shines indeed a luminary in this defence.—Mr. President, there is an obliquity in human nature that too often disposes us rather to applaud the brilliant, though pernicious ingenuity that can "make the worse appear the better reason," than the humble but useful efforts of a mind engaged in an honest search after truth. There is something fascinating in such a display of the powers of the human mind. The vanity of the whole species soothes itself with the excellence of an individual. We yield to the illusions of self love, "*we* lay the flattering unction to our souls,"—and are cheated and abused. It is under this perverse bias of our nature that I render to the honorable attorney general of Maryland the willing tribute of my admiration. But, he will pardon me—I cannot suppose him serious. I will not do him the injustice to

Digitized by Google

believe that to a noble motive—to long habits of political and social intercourse— a friendship of thirty years standing, he has refused what he himself tells you is done, every day, nay, in nine hundred and ninety nine cases in a thousand—by persons of his profession, for a mercenary consideration. What has he said? "*That, in defence of their clients, lawyers are in the daily habit of laying down as law what they know not to be law.*" Mr. President, when I see a man of his unrivalled resources reduced to the miserable shift of Star Chamber doctrines and precedents before the revolution—and, conscious, no doubt, of the actual weakness of his defence, calling to his aid all the force of wit, ingenuity, repartee, pleasantry and good humour, what inference must I draw? and what must be the conclusion of this honorable court?

[Here Mr. Randolph solicited the indulgence of the court for the very desultory style of his address—not less painful to himself than he felt it to be oppressive and irksome to them. This defect, the result of his incompetency, had been aggravated by the loss of the voluminous notes which he had taken, and which, but for that accident, he would have been able to reduce to something like system and method. It was however the strength of the cause, and not the ability of the advocate—the weight of the bullion, not the fashion of the plate—on which he relied. The court would decide according to the evidence, and that was enough.]

I will now, with the court's permission, offer some observations on the articles growing out of Callender's case. The second article relates to the over-ruling of Bassett's objection to serve upon the jury. That Bassett did object to serving on that jury is established by the concurrent testimony of Mr. Hay, Mr. Nicholas, and Mr. Robertson, who took down the proceedings upon the trial in short hand, and of the juror himself, who has appeared as evidence on behalf of the accused. And yet, sir, the counsel affirm that he offered no objection, but merely expressed 'scruples of delicacy,' against serving.—Delicate distinction this.—What is an *objection?* A man is called upon to do a particular act—on which he states reasons, or *doubts*, if you will

Digitized by Google

have it so, why he should not do it. This is not a *refusal*, or a *denial*, but what is it, if not an *objection?* And an objection too, which according to the respondent's own rule, as laid down on that trial, ought to have disqualified the juror. For he has deposed—and if he had not, we have the strongest testimony to the fact—that, from extracts which had appeared in the newspapers, he had formed *and delivered* an opinion, that "The Prospect Before Us" came within the sedition law. Sir, if he had never delivered such an opinion before, he did *then* deliver it, at the time and in the place of all others, the most injurious to the prisoner and disqualifying of himself—in open court preceding the trial. As to the wretched subterfuge that he had not delivered any opinion respecting the charges contained in the '*indictment*,' which he had never seen, and which he was not permitted to see, or to hear read, 'tis a mockery of common sense, that gives the finishing stroke to the tyrannous and insulting conduct of the judge. He had formed and delivered an opinion of the publication, from which the charges contained in the indictment were extracted—and although he could not possibly know the particular sets of words selected by the public prosecutor as libellous, he *did not*, he *could not* possess that unbiassed and impartial state of mind requisite to constitute a good juror. The testimony which he has delivered before this honorable court corroborates every objection which could have been urged to him. He has shewn himself too far gone in political gangrene, to have decided fairly, any question, in which the feelings of the then ruling party were at all involved. Indeed he seems to have had some confused perception of his own unfitness. But that, which in the estimation of every honorable mind—which even in his opinion constituted an objection to him, was his strongest recommendation to the judge. The objection was over-ruled—Bassett was declared a good juror—was sworn, and served accordingly. And all this is justified on the authority of the court of Star Chamber, and of Lord Chief Justice Keeling.

Digitized by Google

On the subject of Mr. Taylor's testimony, its rejection is attempted to be defended by a solitary precedent, *in a civil case*, drawn from a reporter, who, I am informed by gentlemen of the first professional character, is far from being considered as very good authority. I mean M'Nally. In support of this article I might urge as well the admissions of the honorable attorney general of Maryland, as the universal practice of our courts. What said Mr. Robertson—and what said the Chief Justice of the United States, on whose evidence I specially rely? He never knew such a case occur before. He never heard a similar objection advanced by any court, until that instance. And this is the cautious and guarded language of a man placed in the delicate situation of being compelled to give testimony against a brother judge. What more could you expect from a person thus circumstanced? What does it prove but that the respondent was the first man to raise, to invent such an objection to a witness? Can any one doubt Mr. Marshall's thorough acquaintance with our laws? Can it be pretended that any man is better versed in their theory or practice? And yet in all his extensive reading, in his long and extensive practice, in the many trials of which he has been a spectator, and the yet greater number at which he has assisted, he had never witnessed such a case. It was reserved for the respondent to exhibit, for the first, and I trust, for the last time, this fatal novelty, this new and horrible doctrine that threatens at one blow all that is valuable in our criminal jurisprudence.

Against the fourth article the attorney general of Maryland hath adduced a similar and doubtful authority, in defence of his client. And here again I bottom myself upon the testimony of the same great man, yet more illustrious for his abilities than for the high station that he fills, eminent as it is. He declares that he has never known a similar requisition made by any court; that where the propriety of questions, verbally propounded, has been denied, or for the sake of precision, (where they were intricate,) they have been reduced to writing at the request, or order, of the court;—

Digitized by Google

but in the first instance and before they had been stated verbally, *never*, within the compass of his experience. And what inference can any candid, unprejudiced mind draw from these repeated and, until then, unprecedented acts of interference by the judge, on behalf of the prosecution, but that instead of an umpire, he was a partizan?

With regard to his deportment towards the counsel, I shall call the attention of the court not to the statement made by themselves:—because I question it in the slightest degree? God forbid! I know those able and honorable men too well—but because I would deprive our opponents of their almost sole argument—the personal irritation which they alledge those witnesses must have felt. Waving then any remarks on their testimony, powerful as it is, I again ask you, what said the Chief Justice? And, if I may say so, *what did he look?* He felt all the delicacy of his situation, and as he could not approve, he declined giving any opinion on the demeanor of his associate. What does Mr. Robertson say? In substance, every thing that has been deposed by the other witnesses: "That the judge always spoke in the first person singular." And here I will remark, that the short hand report which this gentleman made of the trial, and which he has given in evidence, was published, in the first instance, as a defence of Mr. Chase against alledged misrepresentations of his conduct on that occasion. It cannot be considered, therefore, as an *un*-favorable view of the transaction, at least so far as the respondent is concerned. What says Mr. Gooch? That the judge was very '*yearnest*' with the counsel: that they were much abashed; that he set them down; that they appeared alternately red and pale; that he exhibited their confusion to the mirth of all the by-standers: and col. Taylor tells you, "that *the conduct of the judge had the full effect it seemed intended to produce*—to abash the counsel for the prisoner, and *turn them into ridicule*, for that every body laughed but themselves."

But the ingenious attorney general of Maryland, whose fruitful invention is never without resource, has

Digitized by Google

endeavored to persuade you, that this conduct was not merely justifiable, but even meritorious. That the design of the counsel was to irritate and inflame the people, and the respondent, dreading a riot, had no object but to keep the audience in a good humour, and that by a seasonable exertion of his acknowledged wit and pleasantry, he completely succeeded in turning their weapons upon themselves, and totally defeated their purpose. This apology reflects credit on the inventive faculty of him who makes it, and yet what is it but an admission of the charge? Look to the evidence. You will see nothing to support the twist which has been attempted to be given to it—no apprehension of disorder and confusion but what grew out of the insufferable tyranny and insolence of the judge. Where was the respondent at this time? In some obscure corner of the union?—some remote district notorious for disaffection—infamous for its spirit of insurrection?—Far removed from the protection of state or federal authority?—No sir, he was in the enlightened capital of Virginia—a country never disgraced by rebellion, unless the epithet be applied by some squeamish politician to our glorious revolutionary struggle,—a state whose soil has never been stained by insubordination to law.—No, sir, he was sitting within a stone's throw of the residence of the Governor of Virginia,—a man of whom I shall say nothing. Let the exalted stations he has more than filled—the high public trusts on which he has seemed rather to confer honor than receive it—his unshaken constancy in the worst of times—the dismay and confusion of his enemies, whose vain aspersions have passed him like the idle wind,—let the confidence of a united people speak his eulogium. The respondent was sitting within musket shot of a cantonment of federal troops.—Why were these troops placed there at that time, and why were they kept there for some time afterwards, belongs not to my present purpose. It is enough to say that they were a part of our famous provisional army—"*fruges consumere nati*"—to ascertain their readiness to protect in any outrage on the law, or constitution, (then practised or

Digitized by Google

meditated) the government that maintained them in dissolute idleness. Governor Monroe was more interested in the respondent's safety than he himself appears to have been. He trembled lest the indignation of the people should get the better of their good sense, and hurry them into some act of violence, that would cast an odium on the state and afford matter of triumph to her enemies. That the respondent's object was to goad her citizens to some outrage, which might justify the humiliation that was preparing for her, there is too much reason to believe—and that he would have succeeded, but for the intervention and influence of that excellent man, and the persuasions of the counsel themselves, whom the attorney general of Maryland would represent as endeavoring to excite public commotion, that he may find some shelter for the enormities of his client.

Another attempt at justification of his conduct on this trial is by reference to the law and practice in Maryland. But surely the judge who scouted the idea of being governed by the law of Virginia, whilst exercising jurisdiction there, shall not be permitted to take refuge under the law of another state. For if the law of Virginia was not binding on the respondent, in Virginia, *a fortiori*, he could not have been governed by the law of Maryland.—But you are asked, whether the respondent's conduct as stated by the prosecutors, is not too inconsistent with the character universally ascribed to him for discernment,—by his enemies as well as by his friends,—to be credited:—Whether to attain his object (granting it to have been corrupt) he was under any necessity to unmask and wantonly expose himself to future punishment? Without noticing that this is argument against fact,—hypothesis opposed to actual experiment,—his conduct may easily be reconciled with his character, and with the circumstances attending it. "If his object was oppression, why did he not lie in ambush, (say his counsel) why disclose (nay almost avow) it?" Because caution and circumspection form no part of the charges against him:—because (even allowing that he is as conspicuous for those

Digitized by Google

qualities, as he is notorious for the reverse) there is no principle of human nature, or human conduct, more true, more invariable than this;—that whatsoever be the general character of a man, he is unable, at all times, to act up to it. It is the inevitable condition annexed to guilt, that it will betray itself—'tis the privilege of truth alone always to be consistent. We find him in the case of Fries not more dictatorial and arbitrary, than wavering and irresolute. On one day arrogant and imperious—on the next alarmed and trying to remove the impression his rashness had made—retracing his steps, sitting (as you are told by his counsel) not on the bench of justice, but on the stool of repentance, "draining the cup of humiliation to the very dregs,"—in a word, a man penitent and of contrite heart. That repentance although it cannot avail here, will (if sincere) be accepted by another and more dread tribunal.—But much I fear that the contrition which is accompanied by a threat will avail but little, although offered at the throne of mercy itself. No sir, fortunately for us, although the tyger and hyæna too often appear in human shape, there is no disguise that can long conceal them—not even though they crouch upon the judgment seat and under the ermine. Thanks to the beneficence of God! this insidious character cannot always be supported. God forbid it should! "No wonder (says the attorney general of Maryland) that the people of Pennsylvania wish to get rid of the bar," alluding to the case of Fries. Rather let him say no wonder that they are tired of the bench—for it is against the judges,—this very judge, in that very case, that they have protested. They have deprecated his jurisdiction over them—and the solemn protest of their representatives against his iniquitous condemnation of Fries, is the ground work of the present prosecution.

But our doctrine, it is said, goes to prostrate the rights of the accused—where?—at the feet of juries. There may they for ever lie—but never at the foot of a judge. The gentleman from South Carolina (I beg his pardon) deprecates the placing of criminal law solely in the

Digitized by Google

power of juries. He would not have the life of a man depend on their decision of a point of law. But 'tis the glorious attribute of jury trial, that the question of guilty, or not guilty, involving both law and fact, *that* law as well as *that* fact the jury alone is competent to determine. It is the necessary consequence of the general verdict which they are required to find. The very able and learned attorney general of Maryland indeed says that this is an incidental *power*, rather than a *right* of the jury. But sir, what is that power which no man may question, but a right? For whether incidental or direct, the exercise of it is final and complete, if in favor of the accused;—and the power of the court to award him a new trial is further protection to the prisoner against abuse. There is no specific power given, in so many words, by the constitution, to Congress, to punish robberies of the mail:—but it is incidental to the right of establishing post offices and post roads, and necessary to carry the specified power into effect. This curious distinction between "*right* and *power*, *direct* and *incidental*," is an *ignis fatuus* of the learned gentleman's composition to bewilder and mislead us from our object, that we may be lost and led astray over a wild moor of absurdities. The right of the jury is not the less, whether immediate, or derivative—as Congress possess the power to pass all laws necessary to carry any delegated power into effect, in like manner, juries possess every power necessary to the general verdict which they have a right to give. The violation on the part of the judge of the incidental power, as much subjects him to punishment, as if he had invaded the original right over the fact, to which it is appendant. What would he say to a robber of the mail claiming impunity because the power to make the offence penal was incidental, and not specified in the constitution? But say gentlemen we admit the *power* in the jury, we only deny the *right*:—and in this tissue of self contradictions they declare, that whilst a jury is bound by the exposition of the law, as laid down by the court, yet they have not the right to determine whether the facts come within the law. Can there be a greater absurdity?

Digitized by Google

"Whilst the jury have no right to decide the law, they must decide whether the facts come within the law!" If the jury is tied down by the court's construction of the law, is it not plain that *they* do *not* decide whether the fact is, or is not, embraced by the law? But that whilst they find the naked fact, it is the *court* that determines whether that fact does, or does not, come within the law. Gracious God! Is it come to this? Are the great principles for which our forefathers contended, and many of yourselves have bled, now to be frittered away by technical sophistry?—Is the same doctrine to be established here in capital offences—in cases of treason—that Lord Mansfield attempted to impose on the people of England as the law of libel—and which they would not endure. Shall principles of criminal law which they have scouted, even in cases not capital, be established here for the decision of capital offences? that whilst the jury find the facts, their application to the law shall depend solely on the will of the court. I deny the gentleman's law—and assert that, as an American citizen, I would refuse to be bound by it. A man is charged with having committed certain treasonable acts. The constitution has defined treason to consist "in levying war against the United States, or in adhering to their enemies, giving them aid and comfort." But the court, assuming to themselves a more than papal infallibility—the exclusive exposition and construction of the constitution, tell me as a juror to surrender into their hands my conscience and my understanding:—that as a levying of war is treason, so is the picking up of a pin a levying of war—that I, an unlearned layman, must not presume to expound the holy scripture of the constitution, but must leave that to the elect,—and if the fact of his having picked up the pin be proved to my satisfaction, I am bound to find the prisoner guilty of levying war against his country,—to convict him of treason. Sir, the parallel runs upon all fours—for there is nothing to uphold this monstrous judicial assumption but that which supported the pretensions of the Roman Pontiff,—the willing obedience of ignorant superstition.

Digitized by Google

If the jury is contumacious,—if, whilst they confess their entire conviction of the truth of the fact charged in the indictment, they deny the legal doctrine and acquit the prisoner, the court is without redress. They may bully and look big:—there is no help. Put the case of murder.—A killing with malice aforethought is charged upon the prisoner:—there is no dispute about facts; tis admitted that the party arraigned did *kill* the deceased. Shall I, a juror, contenting myself with deciding a fact that nobody disputes, surrender to the court the question of law, should they attempt to usurp it,—(as that killing with a particular weapon is a killing with malice prepense) and find a man guilty of murder whom I believe to have acted in self defence?—in defence of life, or (what is dearer than life) of reputation? No sir, I will not find him guilty although all the courts in the universe should instruct me to do so. I will look to the great precept, "do as you would be done by," and say "I would have done so too," and therefore I will not say "that man ought not so to have done?" And what is there, sir, in the words '*levying of war*,' more unintelligible than in the words '*malice prepense*.' The first being altogether a matter of fact would appear more exclusively the province of the jury than the last, which rather partakes of a question of opinion—If you leave the law in criminal cases to the jury (as well as the fact) you are safe—but if your decision should sanction the opposite doctrine, you set all our liberties, fixed by the decisions of ages, afloat on an ocean of uncertainty and contention. We have no beacon, no compass, no polar star to direct our course. If you suffer the rights of the jury to be thus invaded on a criminal trial, on a trial for life and death—you bind us in conclusions more fatal than those of the church of Rome. You force us one moment to say whether such a fact amounts to such a crime, and, the next, you will not permit us to know what the crime is. I hope the marshal will never summon me on such a jury. I give him warning—I will never surrender the constitution, my understanding and my oath to the '*grimgribber*' of a court of law. I should consider myself

Digitized by Google

as much entitled to decide the law for the judge in a civil case, as bound by his decision of it in a criminal one. Vain and futile is the attempt of the constitution to settle and define treason, if that definition is to mean any thing or nothing at the option of a corrupt judge. If this doctrine, sir, be denied by any member of this honorable court, let him, in his legislative capacity, move for a bill "to render juries more obedient to judges, and *especially in criminal cases.*" Until that is done, I shall refuse obedience to their dictates, and act as a juror upon the principles which I have avowed.

There is an expression, sir, in one of the articles (the 4th) much carped at by the opposite counsel, (Mr. Key) which, as they have proceeded,—every word and tittle,—from my pen, and as I believe them correct, I feel called upon to explain. It is the term '*intemperance*'—Intemperance may consist in gluttony, drunkenness, in other sensual and criminal excesses, or *in a want of temper*;—its manifest meaning here, and in that meaning, confessed by the respondent's counsel, who excuse a particular act, or rather series of acts of intemperance, by alledging that it is habitual to their venerable client,—that it is of seventy years standing,—that it is too inveterate to be corrected'—that he, —and they too, sir, are sorry for it, but it can't be helped. Whatever you may think of the ingenuity of this defence, I am sure, sir, you must allow it candor.

[Here Mr. Randolph entered into a defence of the testimony of John Heath, contending that there was nothing in the evidence of William Marshall inconsistent with it—that it was rebutted only by the evidence of a single witness who might be considered as implicated in the charge.

He also contended for the position that the law of Virginia was binding on the court—where the law of Congress was silent, adducing several cases in illustration of his argument.]

I will now proceed to the eighth article of impeachment in my desultory way, and for it I believe I might plead the precedent set me by the attorney general of

Digitized by Google

Maryland.—The time has been, sir, when the sentiments uttered by the judge in his charge to the grand jury would have been denounced as jacobinical—certain I am they would have come under the sedition law. In England where the church is connected with the state,—indeed, forms a part of the constitution,—parsons have been impeached (and justly too) for preaching "sermons tending to introduce arbitrary government, and containing tenets derogatory to the rights and liberties of the subject."

[Here Mr. Randolph cited the cases of Dr. Mainwaring, in 1628;—4 Hatsell, 125—206;—and of the rev. Richard Thomson, in 1680—ibid. 118.]

But, sir, we are not reduced to reason from analogy.—Here is a case in point.—"On the 23d of December, "1680, Sir Richard Corbett reports, from the committee appointed to examine the proceedings of the "judges in Westminster Hall, several resolutions:" among them is the following:—"That certain expressions in a charge given by Baron Weston were a "scandal to the reformation, *in derogation of the "rights and privileges of parliament, and tending to "raise discord between his majesty and his subjects:*" to which resolution the house agrees, and "resolves that Sir Richard Weston, one of the barons of the court of exchequer, be immediately impeached, and a committee is appointed to prepare the impeachment accordingly."—Hatsell's precedents, vol. 4, 17. These, sir, indeed are '*cases before the revolution*,' but on the eve of it, when the nation was making a stand against the Duke of York, afterwards James II.

In addition, we might cite the respondent's own authority, who, on the trial of Callender, declared "that if he knew himself, the opinion he had delivered and the reasons offered in its support flowed not from *political motives, or reasons of state, with which he had no concern, and which he conceived ought never to enter courts of justice*, but from deliberate conviction, &c:"* Try him by his own standard, and you must condemn him—"even handed justice returns the poi-

* "Robertson's printed statement taken in short hand—page 71.

Digitized by Google

soned chalice to his own lips :"—let him drain it to the very dregs. The very crimes on which he shews no mercy in others, he himself hath perpetrated—compare, I beseech you, sir, the ability of this respondent to raise insurrection with that of Fries and Callender,—compare his capacity, intelligence, opportunity and influence with theirs, and then pronounce who is the greatest criminal. With less bodily strength indeed, but with gigantic powers of mind he hath endeavored to alienate the people of Maryland from the general government, and to excite them to nothing short of commotion against their own.

Mr. President, much as I regret the trespass that I have already committed on your patience, I must (painful as it may be to you,—and it is not less so to myself) attempt something like a review of the conduct of this judge. In May, 1800, you find him in Philadelphia, engaged in propagating and establishing the detestable doctrine of constructive and implied treason—which in England has proved the dreadful engine of persecution and murder.—From thence you trace him to Annapolis—not by the blood of John Fries—no, thanks however to him for that :—You hear his declaration in presence of Mr. Mason.—But this his counsel tell you was all a joke—nothing but humour, sir,—like his conduct at Richmond :—if you listen to them, you must become a Pythagorean and believe that the soul of Yorick himself had transmigrated into the body of this judge.—'Tis true he could not be the king's jester, because *unfortunately* we have no king,—we have not yet reached that stage of civilization ;—but, sir, he is the jester of the sovereign people—a jester at your laws and constitution, and it is for you to say whether he shall continue to exercise his function. This jocular conversation is likely to prove a bitter and a biting jest to the respondent. So serious did that most intelligent and respectable witness deem it to be, that he locked it up in his own bosom, without venturing to mention it to any human being. He did not consider himself authorised to play with the fame of the respondent, however dispos *he* might be to sport with the feelings and rights

Digitized by Google

others. This merry fit lasted a long time.—He indulges the same humour in the stage with Mr. Triplett, (an entire stranger): and here let me observe, in justice to this gentleman, that never did any man deliver a more clear and unimpeachable testimony in a court of justice than this witness. It is conclusive. When the judge made personal declarations against Callender, could he be said to administer justice without respect to persons? But, sir, one of our adversaries (Mr. Harper) protests against this sort of evidence, and deems it highly inadmissible. Why?—because forsooth it violates the sanctity of private conversation and wounds the feeling of gentlemen, who may be called on as witnesses. Thank God! sir, we live in a country where the law is open to all, and knows no distinction *between gentlemen* and *simplemen*. No man (I trust) has a greater respect for the real gentleman than myself. When Francis I. (the accomplished monarch of the most gallant people of Europe) deemed it his first distinction to be ranked as the first gentleman of his kingdom, he did not hold that sacred character in higher reverence than I do. But the respondent himself has told you, that a court of justice is a coarse sort of thing, blind to these nice discriminations; that the polished address of a Chesterfield and the rugged scowl of a Thurlow, in the eye of the law, are equal. Suppose a person killed—will not the court hear evidence of a previous declaration, by the prisoner, of ill-will to the deceased?—as "that he would be the death of *him*, &c."—or will they stop to ask whether it was uttered in a tippling-house or a drawing room,—by a ruffian in rags, or in ermine? and yet we are accused of lying in wait for the respondent, of watching his unguarded and convivial hours, of wounding the nerve of social intercourse to the quick. We are ministers of justice: and, as such, we know nothing of these delicate distresses, equally unknown to our forefathers, to the framers of our free and manly institutions. Their composition was of sterner stuff, than this modern, flimsy, fashionable ware. To their robust constitutions and strong common-sense, these qualmish megrims, these

Digitized by Google

sickly sensibilities of morbid refinement were happily unknown. Follow the respondent, then, with the steady and untired step of justice, from Philadelphia to Annapolis, from Annapolis to Richmond, and back again to New-Castle. You see a succession of crimes each treading on the heel, galling the kibe of the other:—so connected in time, and place, and circumstance, and so illustrated by his own confessions, as to leave no shadow of doubt as to his guilt. You are to take the facts not (as his counsel would have you) isolated and dismembered, but embodied;—a series of acts indissolubly linked together,—each supporting each, animated by the vital principle of guilt that pervades and gives life to the whole. God hath joined them:—no man shall, or can put them asunder. Carry your mind back to the state of things in 1800:—then advert to the testimony in the case of Fries. Lewis, Dallas, Tilghman, and *even Rawle* declaring that they had never witnessed such a proceeding before;—pronouncing the conduct of the judge, on that occasion, to be altogether novel in the annals of our criminal jurisprudence. The same spirit pervades his whole career. But you are warned by the counsel (Mr. Harper) not to tarnish the laurels of your political victory, by an unmanly triumph over a fallen adversary. He implores the tribute of a sigh for the mournful yew and funereal cypress that bedecks the hearse of his political reputation. Dreading the decision of your judgment, your sympathies are enlisted for his client. An aged patriot, whose head is whitened with the hoar of three score and ten years, is presented to your afflicted imaginations:—broken with disease—compelled to employ his few and short intervals from pain and sickness,—to spend the last moments of a life devoted to a thankless country's service, in defending himself against a criminal prosecution. Do we thirst for his blood?—yet even there English authorities would bear us out—Do we seek to lead him to Tower Hill? If his heart will fly in his face, is it we who cast it there? Do we even ask his disfranchisement? No, sir, we only demand the removal of a man, whom the very suspicion of such

Digitized by Google

crimes unfits for the high station which he fills.—A man bent with age and infirmity, struggling with misfortune, is a venerable object, entitled to your sympathy, even although he were not a patriot.—Mine shall never be denied to such a character. But, sir, mark the difference between Samuel Chase, powerful and protected, and John Fries, feeble and oppressed—Look at the one lodged in a sumptuous hotel, partaking of the best cheer, surrounded and supported by every comfort of life, by a large and respectable circle of friends, indulged with ample time for his defence, assisted by counsel second to none in the land, unrestricted in the conduct of their cause. When I give a man so situated my sympathy, it is not of so jejune a cast as to refuse itself to the victim of his injustice:—a hardy yeoman wrestling with indigence and persecution—selling his last bit of property to support a long imprisonment and meet the expenses of this very prosecution;—a soldier of the revolution with whom the words stamp act and window tax were synonimous with slavery,—who in a moment of political delirium (perhaps of intoxication) —had instinctively raised his hand against what he deemed an oppressive tax,—immured in a dungeon, listening only to the clanking of fetters—snatched from the bosom of his family,—to whom no doubt he was a kind parent and an affectionate husband—for be it remembered he was popular and beloved among his neighbours;—this man, caught in the trap of judicial and constructive treason, at which common sense revolts,—laid by the heels, trembling at the charge, ignorant of the extent of the law, without a friend to comfort and console him, no counsel in his defence—such a man, so situated, is as much entitled to my sympathy as any king that ever wore a crown—and he shall have it;—he shall have more,—he shall have justice from this honorable court. Yes, sir, to my shame I confess, that my sympathy is not of this exclusive sort. It is not scared by the homely garb of poverty and wretchedness. It can feel for misfortune even if it be not sumptuously arrayed. But let us suppose the character of John Fries to have been what one of our opponents has

Digitized by Google

represented it—the other, on all sides 'tis agreed, was every way base and detestable.—Yet, sir, this will not render your decision more favorable to the accused. If Fries was a dangerous rebel, new cause of discontent and disaffection should not have been given to his countrymen by condemning him unfairly and unheard. Is this the way to extinguish the spirit of revolt,—to reconcile freemen to your government? Sir, we do not appear at your bar the advocates of Fries and Callender, but of the violated laws of your country. We know, it is in the persons of the weak, the worthless and the wicked, that the liberties of every people are first attacked—and we feel that society is as deeply interested in protecting the most obscure and friendless of her members, as her most illustrious benefactor:—and more so—for this last may protect himself. Be the character and condition of the prisoner what they may, we say, '*give him a fair trial*:'—the greater his guilt, the less the occasion of relaxing the principles of law and justice in trying him—If he be a great state prisoner, dangerous to government from the number and power of his followers, the greater the necessity for a rigid adherence to those principles, that no pretext for future insurrection be found in the injustice of his sentence. Sir, if these men had had fair trials, our lips would have been closed in eternal silence. Look at the case of Logwood. The able and excellent judge (whose worth was never fully known until he was raised to the bench) who presided at that trial, uttered not one syllable that could prejudice the defence of the prisoner. He felt, he knew that the wretch was entitled to fair play, and he gave it him. We heard of no prejudged (written, or verbal) opinion, in that case;—no denial of testimony, no requisition that questions should be reduced to writing and submitted to the inspection of the court, before they were suffered to be propounded to a witness—none of the respondent's new discoveries in criminal law were there brought into play. The chief justice knew that, sooner or later, the law was an overmatch for the dishonest, and leaving the cause of the commonwealth to its attorney, he disdained to descend

Digitized by Google

from his great elevation to the low level of a public prosecutor. He let the law take its course. But, sir, the honorable attorney general of Maryland has said, that these men had fair trials;—or what he terms '*the essence of an impartial trial*'—that they were guilty, and found guilty accordingly;—and had the verdict (the essence of the trial) been otherwise, it would have been partial and unjust. That is to say, sir, that the end will justify any means resorted to for its accomplishment:—that all the forms of law, invented to protect the innocent, may be dispensed with on the trial of the guilty,—that you may deny a man the benefit of testimony, or counsel in his behalf, on his trial, and after he is hanged, bring forward evidence of his guilt to justify the deed. Do you want other proof of the weakness of a cause, when men of sense defend it by arguments like these? If the respondent be indeed innocent, in his name I impeach his defenders—if he is not guilty they have betrayed his cause.

Had I, Mr. President, been governed in this case, by considerations of personal feeling, rather than by my duty to the public, I should, long since, have asked a respite from a task, to which I feel myself physically, as well as morally incompetent. In a little time and I will dismiss you to the suggestions of your own consciences.—My weakness and want of ability prevent me from urging my cause as I could wish—but it is the last day of my sufferings and of yours.

We are asked to assign any rational motive for the conduct imputed to the respondent. His object might have been to court the administration which he upheld and supported, to recommend himself to the President of the United States, to obtain the Chief Justiceship. Those who are anxious to attract the notice and favor of the powers that be, are not apt to put their light under a bushel. The fulsomeness of sycophants, who always over-act their part, is proverbial. Sir, he might be aspiring to the Presidency itself, and anxious to engage the favor of the leaders of his party. Let it be remembered, the triumph of that day was complete, and the reckoning of this day too remote from probability to be

Digitized by Google

taken into the account. Here, sir, you have a key to his whole conduct. It becomes you, then, Mr. President and Gentlemen of the Senate, to determine, whether a man, whose whole judicial life hath been marked by habitual outrage upon decorum and duty, too inveterate to give the least hope of reformation, interwoven and incorporated with his very nature, shall be arrested in his career, or again let loose upon society, to prey upon the property, liberty and life of those who will not rally around his political standard. We have performed our duty:—we have bound the criminal and dragged him to your altar. The nation expects from you that award which the evidence and the law requires. It remains for you to say whether he shall again become the scourge of an exasperated people, or whether he shall stand as a land-mark and a beacon to the present generation, and a warning to the future, that no talents however great, no age however venerable, no character however sacred, no connexions however influential, shall save that man from the justice of his country, who prostitutes the best gifts of Nature and of God, and the power with which he is invested for the general good, to the low purposes of an electioneering partizan. We adjure you on behalf of the House of Representatives and of all the people of the United States, to exorcise from our courts the baleful spirit of party—to give an awful memento to our judges. In the name of the Nation, I demand at your hands the award of justice and of law.

Mr. HARPER—I beg leave, Mr. President, to correct the honorable gentleman who has just concluded, (Mr. Randolph) with respect to what he has called admissions on our part; and to notice a little the authority which he has read respecting chief justice Keelynge.

The *President* observed that it would be necessary for Mr. Harper to confine himself to the facts which he considered mistated.

Mr. *Harper*. The honorable gentleman has stated that we admitted *our* client to be guilty. I disclaim and deny any such admission. Had we made it, we

Digitized by Google

should have admitted what is not true. We did, indeed, admit, that our client has been guilty of some casual indiscretions, such as are common to every man; but we neither did or could admit more.

The honorable gentleman is also incorrect, in his manner of stating John Heath's testimony. John Heath did positively swear, that he told the circumstances to Mr. Holmes, within an hour after the conversation in his presence took place, between the respondent and the marshal.

The honorable gentleman has also said, that I compared the conduct of my client, to a brawl or a riot. This is an utter mistake. I said no such thing. I made no such comparison.

The *President* here checked Mr. Harper, who was apparently entering into an argument.

Mr. *Harper*. I will confine myself to saying the remark of the honorable gentleman is a mistake.

As to the authority cited by the honorable gentleman from Hatsell, to shew that Sir John Keelynge was a man of worthless character, whose writings are not entitled to credit; it does, indeed, appear from Hatsell, that Sir John Keelynge, while chief justice of England, was cited to appear before the House of Commons, upon charges exhibited against him. But what was the result? The honorable gentleman has omitted to inform us. But had he proceeded to read the next sentence in the book, he would have found that Sir John Keelynge appeared to the summons, made his defence, and was most honorably acquitted. It was a light, vague and groundless accusation, which met with the fate that ought ever to attend such accusations, and that I hope will attend the present.

The honorable gentleman has also discovered, that the decisions reported by Sir John Keelynge, which were cited by my learned colleague, were star chamber decisions; and he has indulged himself in repeating many of the usual invectives, against star chamber proceedings, and star chamber decisions. But where did he find that these decisions were made in the star chamber? If he had taken the trouble to read the book,

Digitized by Google

which together with its author, he has so much stigmatised, he would have found that these decisions were made, not in the star chamber, but in the court of king's bench; which was at that time filled by some of the ablest lawyers that England has ever produced. If he will take the trouble to open the learned work of Hale on the criminal law: of Hale whom he and his colleagues have so much and so justly extolled, and whose eulogium is a perpetual theme in every court of criminal jurisdiction, if he will turn to Hawkins, the leading authority and constant manuel on criminal law; he will find that Keelynge's reports are constantly cited as authority, by those learned writers; and that the very decisions cited by my learned colleague, which have so strongly excited the indignation of the honorable gentleman himself, are at this moment considered as the established law of England, and consequently of this country, so far as they apply.

The latitude allowed by this honorable court, would admit of my correcting many other mistakes of minor importance, into which the honorable gentleman has fallen: but the lateness of the hour, and an anxious wish to bring the trial to a close, admonish me to abstain from any further remarks.

Mr. RANDOLPH said he hoped that until to-morrow would be allowed the gentleman to make any further observations he might be desirous to offer. Mr. Harper having declined saying any thing more—the President informed Mr. R. that he was at liberty to reply to Mr. Harper.

Mr. Randolph. Sir, I did not say that Keelynge was star-chamber authority—I expressly stated that he was chief justice of the king's bench.—At the time of his impeachment the court of high commission and star-chamber had been abolished forty years.—But I did aver (and I repeat the assertion) that star-chamber authorities had been adduced to justify the conduct of the respondent. Keelynge was impeached for innovation in trials of men for their lives, and putting unlawful restraints on juries. 'Tis true, sir, the commons dropped

Digitized by Google

their prosecution, but what does that prove?—Surely not even his own innocence, much less that of the respondent. If we have not made out our case, if we are not fully supported by the law and the evidence, you will acquit the accused, not by a scanty and frigid majority, but by an unanimous vote. If we have not proved the truth of our charge, on us, and on all the people of America, who cry aloud against him, be the shame. —Let us be dismissed to infamy, and Hosannas be sung to him whom the highest tribunal of the nation delighteth to honor.

On motion of Mr. Jackson,

Resolved, That this court will on Friday next, at 12 o'clock, pronounce judgment in the case of Samuel Chase, one of the associate justices of the supreme court of the United States.

FRIDAY, March 1, 1805.

The court being opened by proclamation, the managers, accompanied by the House of Representatives, attended.

The counsel for the respondent also attended.

The consideration of the motion, made yesterday for an alteration of one of the rules in cases of impeachments, was resumed: Whereupon,

Resolved, That in taking the judgment of the Senate upon the articles of impeachment now depending against Samuel Chase, esq. the President of the Senate shall call on each member by his name, and upon each article, propose the following question, in the manner following: "Mr. —— how say you, is the respondent Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the —— article of impeachment?"

Whereupon, each member shall rise in his place, and answer guilty or not guilty.

Digitized by Google

The President rose, and addressing himself to the members of the court, said:

GENTLEMEN,

You have heard the evidence and arguments adduced on the trial of Samuel Chase, impeached for high crimes and misdemeanors: you will now proceed to pronounce distinctly your judgement on each article.

The Secretary then read the first article of impeachment, as follows:

ARTICLE I.

That, unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held, for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust, *viz*:

1. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence:

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client:

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine

Digitized by Google

his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give:

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties, as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the constitution, and was condemned to death without having been heard, by counsel, in his defence, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people.

When the President took the opinion of the members of the court, respectively, in the form following:

Mr. —— how say you, is the respondent Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the first article of impeachment?

Those who pronounced guilty, are

Messrs. Anderson, Baldwin, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Howland, Logan, Maclay, Moore, Stone, Sumter, Worthington, Wright.—16.

Those who pronounced not guilty, are,

Messrs. Adams, Bayard, Bradley, Dayton, Gaillard, Giles, Hillhouse, Jackson, Mitchill, Olcott, Pickering, Plumer, Smith, of Md. Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Tracy, White—18.

The second article was read by the secretary, as follows:

ARTICLE II.

That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callendar was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress,

Digitized by Google

and procure the conviction of, the said Callendar, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind, as to the publication from which the words, charged to be libellous, in the indictment, were extracted; and the said Basset was accordingly sworn, and did serve on the said jury, by whose verdict the prisoner was subsequently convicted.

Those who pronounced guilty on this article, are,

Messrs. Anderson, Breckenridge, Cocke, Condit, Ellery, Giles, Howland, Maclay, Moore, Sumter—10.

Those who pronounced not guilty, are,

Messrs. Adams, Baldwin, Bayard, Bradley, Brown, Dayton, Franklin, Gaillard, Hillhouse, Jackson, Logan, Mitchill, Olcott, Pickering, Plumer, Smith, of Maryland, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Stone, Tracy, White, Worthington, Wright—24.

The third article was read by the secretary, as follows:

ARTICLE III.

That, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callendar, was not permitted by the said Samuel Chase to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact.

Those who pronounced guilty on this article, are,

Messrs. Anderson, Baldwin, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Moore, Smith, of Maryland, Sumter, Worthington, Wright—18.

Those who pronounced not guilty, are,

Messrs. Adams, Bayard, Bradley, Dayton, Gaillard, Hillhouse, Mitchill, Olcott, Pickering, Plumer, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Stone, Tracy, White—16.

The fourth article was read by the secretary, as follows:

ARTICLE IV.

That the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance, *viz.*

Digitized by Google

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that with the utmost diligence, the attendance of such witnesses could not have been procured, at that term.

3. In the use of unusual, rude, and contemptuous expressions towards the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend.

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which, at length, induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment.

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice.

Those who pronounced guilty on this article, are,

Messrs. Anderson, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Moore, Smith, of Maryland, Stone, Sumter, Worthington, Wright—18.

Those who pronounced not guilty, are,

Messrs. Adams, Baldwin, Bayard, Bradley, Dayton, Gaillard, Hillhouse, Mitchill, Olcott, Pickering, Plumer, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Tracy, White—16.

The fifth article was read by the secretary, as follows:

ARTICLE V.

And whereas it is provided by the act of Congress passed on the 24th day of September, 1789, *intituled*

Digitized by Google

"An act to establish the judicial courts of the United States," that for any crime, or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the state where such offender may be found: and whereas it is provided by the laws of Virginia, that, upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person, or persons offending, to appear and answer such presentment at the next court; yet, the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thompson Callendar, indicted for an offence not capital, whereupon the said Callendar was arrested and committed to close custody, contrary to law in that case made and provided,

All the members pronounced not guilty on this article, *viz.*

Messrs. Adams, Anderson, Baldwin, Bayard, Bradley, Breckenridge, Brown, Cocke, Condit, Dayton, Ellery, Franklin, Gaillard, Giles, Hillhouse, Howland, Jackson, Logan, Maclay, Mitchill, Moore, Olcott, Pickering, Plumer, Smith, of Maryland, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Stone, Sumter, Tracy, White, Worthington, Wright—34.

The sixth article was read by the secretary, as follows:

ARTICLE VI.

And whereas it is provided by the 34th section of the aforesaid act, entitled "An act to establish the judicial courts of the United States," that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law, in the courts of the United States, in cases where they apply; and whereas by the laws of Virginia, it is provided, that in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next succeeding that during which such presentment shall have been made, yet the said Samuel Chase, with intent to op-

Digitized by Google

press, and procure the conviction of the said James Thompson Callendar, did at the court aforesaid, rule and adjudge the said Callendar to trial during the term at which he, the said Callendar, was presented and indicted, contrary to law in that case made and provided.

Those who pronounced guilty on this article, are,

Messrs. Breckenridge Cocke, Howland, Maclay—4.

Those who pronounced not guilty, are,

Messrs. Adams, Anderson, Baldwin, Bayard, Bradley, Brown, Condit, Dayton, Ellery, Franklin, Gaillard, Giles, Hillhouse, Jackson, Logan, Mitchill, Moore, Olcott, Pickering, Plumer, Smith, of Maryland, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Stone, Sumter, Tracy, White, Worthington, Wright—30.

The seventh article was read by the secretary, as follows:

ARTICLE VII.

That at a circuit court of the United States, for the district of Delaware, held at New-Castle, in the month of June, one thousand eight hundred, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge, and stoop to the level of an informer, by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury, that he, the said Samuel Chase, understood, "that a highly seditious temper "had manifested itself in the state of Delaware, among "a certain class of people, particularly in New-Castle "county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of "social order,—that the name of this printer was"—but checking himself, as if sensible of the indecorum which he was committing, added—"that it might be "assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to enquire diligently into this matter," or words to that ef-

Digitized by Google

fect; and that with intention to procure the prosecution of the printer in question, the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States, the necessity of procuring a file of the papers to which he alluded, (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser,") and, by a strict examination of them, to find some passage which might furnish the ground-work of a prosecution against the printer of the said paper: thereby degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare.

Those who pronounced guilty on this article, are,

Messrs. Breckenridge, Cocke, Franklin, Howland, Jackson, Maclay, Smith, of Maryland, Stone, Sumter, Wright—10.

Those who pronounced not guilty, are,

Messrs. Adams, Anderson, Baldwin, Bayard, Bradley, Brown, Condit, Dayton, Ellery, Gaillard, Giles, Hillhouse, Logan, Mitchill, Moore, Olcott, Pickering, Plumer, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Tracy, White, Worthington—24.

The eighth article was read by the secretary, as follows:

ARTICLE VIII.

And whereas mutual respect and confidence between the government of the United States and those of the individual states, and between the people and those governments, respectively, are highly conducive to that public harmony, without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore, in the month of May, one thousand eight hundred and three, pervert his official right and duty to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their state government and constitution, a conduct

Digitized by Google

highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States: and moreover, that the said Samuel Chase, then and there, under pretence of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion, and in a proper manner, were at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan.

Those who pronounced guilty on this article, are,

Messrs. Anderson, Baldwin, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Moore, Smith, of Maryland, Stone, Sumter, Worthington, Wright—19.

Those who pronounced not guilty are,

Messrs. Adams, Bayard, Bradley, Dayton, Gaillard, Hillhouse, Mitchill, Olcott, Pickering, Plumer, Smith, of New-York, Smith, of Ohio, Smith, of Vermont, Tracy, White.—15.

The President rose and said, on the *first* Article sixteen gentlemen have pronounced guilty, and eighteen not guilty; on the *second* Article ten have said guilty, and twenty four not guilty; on the *third* Article eighteen have said guilty, and sixteen not guilty; on the *fourth* Article eighteen have said guilty, and sixteen not guilty; on the *fifth* Article there is an unanimous vote of not guilty; on the *sixth* Article four have said guilty, and thirty not guilty; on the *seventh* Article, ten have said guilty, and twenty four not guilty; and on the *eighth* Article, nineteen have said guilty, and fifteen not guilty.

Hence it appears that there is not a constitutional majority of votes finding Samuel Chase, Esquire, guilty, on any one Article. It, therefore, becomes my duty to declare that Samuel Chase, Esquire, stands acquitted of all the Articles exhibited by the House of Representatives against him.

Whereupon,

The Court adjourned without day.

Digitized by Google

The following is a table of the Votes given on the several ARTICLES.

	Art. 1.	Art. 2.	Art. 3.	Art. 4.	Art. 5.	Art. 6.	Art. 7.	Art. 8.
Mr. Adams, Mas.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Anderson, Ten.	g.	g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Baldwin, Georgia,	g.	n. g.	g.	n. g.	n. g.	n. g.	n. g.	g.
Mr. Bayard, Delaware,	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Bradley, Vermont,	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Breckenridge, Ken.	g.	g.	g.	g.	n. g.	g.	g.	g.
Mr. Brown, Kentucky,	g.	n. g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Cocke, Tennessee,	g.	g.	g.	g.	n. g.	g.	g.	g.
Mr. Condit, N. Jersey,	g.	g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Dayton, N. Jersey,	n. g.	n. g.	n. g.	n. g.	n. g	n. g.	n. g.	n. g.
Mr. Ellery, R. Island,	g.	g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Franklin, N. C.	g.	n. g.	g.	g.	n. g.	n. g.	g.	g.
Mr. Gaillard, S. C.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g	n. g.
Mr. Giles, Virginia,	n. g.	g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Hillhouse, Con.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Howland, R. I.	g.	g.	g.	g.	n. g.	g.	g.	g.
Mr. Jackson, Georgia,	n. g.	n. g.	g.	g.	n. g.	n. g.	g.	g.
Mr. Logan, Penn.	g.	n. g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Maclay, Penn.	g.	g.	g.	g.	n. g.	g.	g.	g.
Mr. Mitchill, N. Y.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Moore, Vir.	g.	g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Olcott, N. H.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Pickering, Mas.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Plumer, N. H.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Israel Smith, Verm.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. J. Smith, N. Y.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. J. Smith, Ohio,	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. S. Smith, Maryland,	n. g.	n. g.	g.	g.	n. g.	n. g.	g.	g.
Mr. Stone, N. C.	g.	n. g.	n. g.	g.	n. g.	n. g.	g.	g.
Mr. Sumpter, S. C.	g.	g.	g.	g.	n. g.	n. g.	g.	g.
Mr. Tracy, Connec.	n. g	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. White, Delaware,	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.	n. g.
Mr. Worthington, Ohio,	g.	n. g.	g.	g.	n. g.	n. g.	n. g.	g.
Mr. Wright, Maryl.	g.	n. g.	g.	g.	n. g.	n. g.	g.	g.
Guilty—	16	10	18	18	0	4	10	19
Not Guilty—	18	24	16	16	34	30	24	15

THE END.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

APPENDIX.

CHARGE *of* JUDGE CHASE, *being Exhibit No. III, referred to in his answer.*

Gentlemen of the Jury!

JOHN FRIES, the priſoner at the bar, ſtands indicted for the crime of *treaſon*, of levying war againſt the United States, contrary to the conſtitution.

By the conſtitution of the United States, art. 3, ſect. 3, it is declared, "That treaſon againſt the United States ſhall conſiſt *only* in *levying war* againſt them, or in adhering to their *enemies*, giving them aid and comfort."

By the ſame ſection it is further declared, "That no perſon ſhall be *convicted* of treaſon, unleſs on the teſtimony of *two* witneſſes to the *same overt act*, or on confeſſion in open court;" and that "the Congreſs ſhall have power to *declare* the puniſhment of treaſon."

Too much praiſe cannot be given to this *constitutional definition* of treaſon, and the requiring ſuch full proof for conviction; and declaring that no attainder of treaſon ſhall work corruption of blood or forfeiture, except during the life of the perſon attainted.

This *constitutional* definition of treaſon is a definition of law. Every propoſition in any ſtatute [whether more or leſs diſtinct—whether eaſy or difficult to comprehend] is always a queſtion of law. What is the true meaning or true import of any ſtatute, and whether the caſe ſtated comes within it, is a queſtion of *law* and not of fact. The queſtion in an indictment for *levying war* againſt [or adhering to the enemies of] the United States, is "whether the facts ſtated do or do not amount to *levying war*" within the contemplation and conſtruction of the conſtitution?

It is the duty of the court in this caſe, and in all *criminal* caſes, to ſtate to the jury their opinion of the law ariſing on the *facts*; but the jury are to decide on the preſent and in all *criminal* caſes, *both the law and the facts*, on their conſideration of the whole caſe.

Digitized by Google

It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by force or violence, any object of a *great public nature* or of *public and general (or national) concern*, is a levying of war against the United States, within the contemplation and construction of the *constitution*.

On this general position the court are of opinion, that any such insurrection or rising to resist, or to prevent by *force or violence*, the execution of *any* statute of the United States, for levying or collecting taxes, duties, imposts or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any pretence, as that the statute was unjust, burthensome, oppressive or unconstitutional, is a levying war against the United States, within the contemplation and construction of the *constitution*.

The reason for this opinion is, that an insurrection to resist or prevent by *force* the execution of *any statute* of the United States, has a *direct tendency* to dissolve all the bonds of society; to destroy all order and all laws; and also all security for the lives, *liberties* and property of the citizens of the United States.

The court are of opinion that military weapons [as guns and swords mentioned in the indictment] are not necessary to make such *insurrection or rising* amount to *levying war*; because numbers supply the want of military weapons; and other *instruments* may effect the intended mischief. The legal *guilt of levying war* may be incurred without the use of military weapons or military array.

The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner for purposes only of a *private* nature, is not *treason*; although the judges or other peace officers should be insulted or resisted, or even great outrages committed to the persons or property of our citizens.

The true criterion to determine whether *acts committed* are *treason*, or a less offence [as a riot] is the *quo animo* or the *intention* with which the people did assemble. When the *intention* is *universal or general*, as to effect some object of a *general public nature*, it will be *treason*, and cannot be considered, construed or *reduced to a riot*. The commission of any number of *felonies*, *riots* or other misdemeanors, cannot alter their nature so as to make them *amount to treason*; and on the other hand, if the *intention and acts combined amount to treason*, they cannot be sunk down to a *felony or riot*. The *intention* with which any acts [as felonies, the destruction of property, or the like] are done, will shew to what *class of crimes* the case belongs.

The court are of opinion that if a body of people conspire and meditate an insurrection to *resist or oppose the execution of any sta-*

Digitized by Google

tute of the United States by force, that they are *only guilty of a high misdemeanor*, but if they proceed to carry *such intention i to execution by force*, that they are guilty of the *treason of levying war*; and the quantum of the force employed neither leſſens nor increaſes the crime, whether by one hundred or one thouſand perſons, is wholly immaterial.

The court are of opinion that a *combination or conſpiracy* to *levy war* againſt the United States is *not treaſon*, unleſs combined with an attempt to carry ſuch combination or conſpiracy into execution; ſome *actual force* or violence muſt be uſed in purſuance of *ſuch deſign to levy war*; but that is altogether immaterial whether the force uſed is ſufficient to effectuate the object; *any force connected with the intention*, will conſtitute the crime of levying war.

This opinion of the court is founded on the ſame principles, and is in ſubſtance, the ſame as the opinion of the circuit court, for this diſtrict, in the trials, in April 1795, of Vigol and Mitchell, who were both found guilty by the jury, and afterwards pardoned by the late Preſident.

At the circuit court for the diſtrict [April term, 1799] on the trial of the priſoner at the bar, judge Iredell *delivered* the *ſame* opinion; and Fries was convicted by the jury.

To ſupport the preſent indictment againſt the priſoner at the bar, two facts muſt be proved to your ſatisfaction. Firſt, That ſome time before the finding of the indictment, there was an inſurrection [or riſing] of a body of people in the county of Northampton, in this ſtate, with intent to oppoſe and prevent, by means of *intimidation* and *violence*, the execution of a law of the United States, entitled 'an act to provide for the valuation of lands and dwelling houſes, and the enumeration of ſlaves within the United States;' or of another law of the United States, entitled 'an act to lay and collect a direct tax within the United States,' and that ſome acts of violence were committed by ſome of the people ſo aſſembled, with intent to oppoſe and prevent by means of intimidation and violence, the exeeution of both or of one of the ſaid laws of Congreſs.

In the conſideration of this fact, you are to conſider and determine with what intent the people aſſembled at Bethlehem, whether to effect by force a public or a private meaſure.

The intent with which the people aſſembled at Bethlehem in Northampton, is a neceſſary ingredient to the fact of aſſembling, and to be proved like any other fact, by the declaration of thoſe who aſſembled, or by acts done by them, when the queſtion is, 'what is a man's intent?' It may be proved by a number of connected circumſtances, or by a ſingle fact.

If from a careful examination of the evidence, you ſhall be convinced that the *real* object and intent of the people aſſembled

Digitized by Google

at Bethlehem, was of a public nature [which it certainly was if they assembled with intent to prevent the execution of both of the abovementioned laws of Congress, or either of them] it must then be proved to your satisfaction that the prisoner at the bar incited, encouraged, promoted, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent by means of intimidation and violence, the execution of both the abovementioned laws of Congress, or either of them; and that *some force* was used by *some* of the people assembled at Bethlehem.

In the consideration of this fact, the court think proper to assist your enquiry by giving you their opinion.

In treason all the *participes criminis* are principals; there are no accessaries to this crime. Every act, which in the case of felony would render a man an *accessary*, will in the case of treason make him a principal. To render any person an accomplice and principal in felony, he must be aiding and abetting *at the fact*, or ready to afford assistance if *necessary*. If a person be present at a felony aiding and assisting, he is a *principal*. It is always material *to* consider, whether the persons charged are of the same *party*, upon the same pursuit, and under the expectation of mutual defence and support. All persons *present*, aiding, assisting or abetting any treasonable act are *principals*. All persons who are present and countenancing, and are ready to afford assistance if necessary to those who actually commit any treasonable act, are also principals. If a number of persons assemble and set out upon a common design, as to resist and prevent by force the execution of any law, and some of them commit acts of violence and force, with intent to oppose the execution of any law, and others are present to aid and assist if necessary, they are all principals. If any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as their's; and the law in this case judgeth of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose by force the execution of a law, any act of violence done by any one of them, in pursuance of such combination, and with intent to effect such object, is in consideration of law the act of all who are present, when such act of violence is committed. If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evidence against *all* of them; the act of each is evidence against all concerned.

I shall not detain you at this late hour to recapitulate the facts—you have taken notes, and they have been stated with accuracy and great candor by Mr. Attorney.

Digitized by Google

I will only remark, that all the evidence relative to tranſactions before the aſſembling of the armed force at Bethlehem, are only to ſatisfy you of the intent with which the body of the people aſſembled there. If either of three overt acts [or open deeds] ſtated in the indictment, are proved to your ſatisfaction, the court are of opinion that is ſufficient to maintain the indictment, for the court are of opinion that every overt act is treaſonable.

As to accomplices, they are legal witneſſes, and entitled to credit unleſs deſtroyed by teſtimony in court.

If, upon conſideration of the whole matter, (*law* as well as *fact*) you are *not* fully ſatisfied without any doubt that the priſoner is guilty of the treaſon charged in the indictment, you will find him not guilty; but if, upon the conſideration of the whole matter, (*law* as well as *fact*) you are convinced that the priſoner is guilty of the treaſon charged in the indictment, you will find him guilty.

EXHIBIT *No. VIII. referred to in* JUDGE CHASE'S *answer.*

COPY of the conclusion of a charge delivered and read from the original manuscript, at a circuit court of the United States, holden in the city of Baltimore, on Monday the second day of May, 1803, *by Samuel Chase, one of the judges of the supreme court of the United States.*

"BEFORE you retire, Gentlemen, to your chamber to conſider ſuch matters as may be brought before you, I will take the liberty to make a few obſervations, which I hope you will receive as flowing only from my regard to the welfare and proſperity of our common country.

It is eſſentially neceſſary at all times, but more particularly at the preſent, that the public mind ſhould be truly informed; and that our citizens ſhould entertain correct principles of government, and fixed ideas of their ſocial rights. It is a very eaſy taſk to deceive or miſlead the great body of the people by propagating plauſible, but falſe doctrines; for the bulk of mankind are governed by their paſſions and not by reaſon.

Falſhood can be more readily diſſeminated than truth, and the latter is heard with reluctance if repugnant to popular prejudice. From the year 1776, I have been a decided and avowed advocate for a repreſentative or republican form of government, as ſince eſtabliſhed by our ſtate and national conſtitutions. It is my ſin-

Digitized by Google

cere wish that freemen should be governed by their representatives, fairly and freely elected by that class of citizens described in our bill of rights, 'who have property in, a common interest with, and an attachment to, the community.

The purposes of civil society are best answered by those governments, where the public safety, happiness and prosperity are best secured; whatever may be the constitution and form of government; but the history of mankind (in ancient and modern times) informs us 'that a monarchy may be free, and that a republic may be a tyranny.' The true test of liberty is in the practical enjoyment of protection to the person and the property of the citizen, from all enquiry. Where the same laws govern the whole society without any distinction, and there is no power to dispense with the execution of the laws; where justice is impartially and speedily administered, and the poorest man in the community may obtain redress against the most wealthy and powerful, and riches afford no protection to violence, and where the person and property of every man are secure from insult and injury; in *that* country the people are free. This is our present situation.—*Where* law is uncertain, partial or arbitrary; where justice *is* not impartially administered to all; where property is insecure, and the person is liable to insult and violence without redress by law, the people are *not free*, whatever may be their form of government. To this situation, I greatly fear we are fast approaching!

You know, gentlemen, that our state and national institutions were framed to secure to every member of the society, equal liberty and equal rights; but the late alteration of the federal judiciary by the abolition of the office of the sixteen circuit judges, and the recent change in our state constitution by the establishing of universal suffrage, and the further alteration that is contemplated in our state judiciary [if adopted] will, in my judgment, take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed, if the bill for the abolition of the two supreme courts should be ratified by the next general assembly. The change of the state constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments.

I can only lament that the main pillar of our state constitution has already been thrown down by the establishment of universal suffrage. By this shock alone the whole building totters to its base, and will crumble into ruins before many years elapse, unless it be restored to its original state. If the independency of your state

Digitized by Google

judges which your bill of rights wisely declares 'to be essential to the impartial administration of justice; and the great security to the rights and liberties of the people,' shall be taken away by the ratification of the bill passed for that purpose, it will precipitate the destruction of your whole state constitution; and there will be nothing left in it worthy the care or support of freemen.

I cannot but remember the great and patriotic characters by whom your state constitution was framed. I cannot but recollect that attempts were then made in favor of universal suffrage; and to render the judges dependant upon the legislature. You may believe that the gentlemen who framed your constitution, possessed the full confidence of the people of Maryland, and that they were esteeemed for their talents and patriotism, and for their public and private virtues. You must have heard that many of them held the highest civil and military stations, and that they, at every risk and danger, assisted to obtain and establish your independence. Their names are enrolled on the journals of the first Congress, and may be seen in the proceedings of the convention that framed our form of government. With great concern I observe, that the sons of some of these characters have united to pull down the beautiful fabric of wisdom and republicanism that their fathers erected!

The declarations respecting the natural rights of man, which originated from the claim of the British parliament to make laws to bind America in all cases whatsoever; the publications since that period, of visionary and theoretical writers, asserting that men in a state of society, are entitled to exercise rights which they possessed in a state of nature; and the modern doctrines by our late reformers, that all men in a state of society, are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us; and I fear that it will rapidly progress, until peace and order, freedom and property shall be destroyed. Our people are taught as a political creed, that men living under an established government, are nevertheless entitled to exercise certain rights which they possessed in a state of nature; and also, that every member of this government is entitled to enjoy an equality of liberty and rights.

I have long since subscribed to the opinion, that there could be no rights of man in a state of nature, previous to the institution of society; and that liberty properly speaking, could not exist in a state of nature, I do not believe that any number of men ever existed together in a state of nature, without some head, leader or chief, whose advice they followed, and whose precepts they obeyed. I really consider a state of nature as a creature of the imagination only, although great names give a sanction to a contrary opinion. The great object for which men establish any

Digitized by Google

form of government, is to obtain security to their persons and property from violence, destroy the security to either and you tear up society by the roots. It appears to me that the institution of government is really no sacrifice made, as some writers contend, to natural liberty, for I think that previous to the formation of some species of government, a state of liberty could not exist. It seems to me that personal *liberty* and *rights* can only be acquired by becoming a member of a community, which gives the protection of the whole to every individual. Without this protection it would, in my opinion, be impracticable to enjoy personal liberty or rights. From hence I conclude that liberty and rights, (and also property) must spring out of civil society, and must be forever subject to the modification of particular governments. I hold the position clear and safe, that all the rights of man can be derived only from the *conventions* of society, and may with propriety be called social rights. I cheerfully subscribe to the doctrine of equal liberty and equal rights, if properly explained. I understand by equality of liberty and rights, only this, that every citizen, without respect to property or station, *should enjoy* an equal share of civil liberty; an equal protection from the laws, and an equal security for his person and property. Any other interpretation of these terms, is in my judgment, destructive of all government and all laws. If I am substantially correct in these sentiments, it is unnecessary to make any application of them, and I will only ask two questions. Will justice be impartially administered by judges dependant on the legislature for their continuance in office, and also for their support? Will liberty or property be protected or secured, by laws made by representatives chosen by electors, who have no property in, a common interest with, or attachment to the community?

True copy,

THOMAS CHASE.

January 31st, 1805.

Digitized by Google

Digitized by Google

*Kv.83c
Sm65

Digitized by Google

Digitized by Google

Digitized by Google

THE BORROWER WILL BE CHARGED AN OVERDUE FEE IF THIS BOOK IS NOT RETURNED TO THE LIBRARY ON OR BEFORE THE LAST DATE STAMPED BELOW. NON-RECEIPT OF OVERDUE NOTICES DOES NOT EXEMPT THE BORROWER FROM OVERDUE FEES.

CANCELLED

APR 7 1987

226 4367

WIDENER

SEP 10 1997

BOOK DUE

Digitized by Google

Digitized by Google